Petition

81-755

Office - Supreme Court, U.S.
FILED
OCT 19 1981
ALEXANDER L. STEVAS,
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No. 81-

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

Burlington Northern Inc.,

Petitioner,

v.

The United States of America and The Interstate Commerce Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Curtis H. Berg
Alan R. Post
176 E. Fifth St.
St. Paul, Minnesota 55101

Of Counsel

R. Eden Martin
Richard E. Young
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 624-1412

Howard J. Trienens
Theodore N. Miller
Richard J. Metzger
One First National Plaza
Chicago, Illinois 60603

Attorneys for Petitioner

October 19, 1981

QUESTIONS PRESENTED

On October 1, 1980, the provisions of the Staggers Rail Act of 1980 became effective. That statute made major changes in the regulatory scheme applicable to railroads by, *inter alia,* (1) divesting the Interstate Commerce Commission ("Commission") of jurisdiction to impose maximum rail rates below a specific jurisdictional threshold (160 percent of variable cost during the first year following enactment and higher percentages thereafter) and (2) conferring exclusive jurisdiction to enforce alleged rate agreements on the courts, rather than on the Commission.

The Commission, on July 13, 1979, had prescribed a maximum reasonable rate of $7.25 per ton for transportation of coal via petitioner Burlington Northern Inc. ("BN")[1] from Belle Ayr, Wyoming, to the generating station of the Iowa Power and Light Company ("IP&L") at Council Bluffs, Iowa. In accordance with this decision, BN filed with the Commission a tariff rate of $7.25 per ton.

On October 1, 1980—the same date as the effective date of the Staggers Act—the Commission served a decision in which it reconsidered its 1979 decision and found that BN and IP&L had entered into a rate agreement (a "letter of understanding") in 1976 and that this agreed rate by 1980 had become $5.62 per ton. The Commission prescribed—to the penny—this asserted agreement-level rate of $5.62 as the maximum reasonable rate. The $5.62 rate amounted to 123 percent of variable cost (as determined by the Commission). The Commission directed that BN's tariff rate for the future be reduced to $5.62, but it did not order reparations for the past.

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[1] Burlington Northern Inc. is affiliated with the following companies: The Colorado and Southern Railway Company, and Fort Worth and Denver Railway Company.

In a decision filed April 27, 1981, the United States Court of Appeals for the Eighth Circuit affirmed the Commission's decision.[2] The Court of Appeals held the new jurisdictional provisions of the Staggers Act inapplicable to this case, and upheld the Commission's decision enforcing the asserted rate agreement in determining the maximum reasonable rate. The Court of Appeals also awarded to IP&L, for the past year, the difference between the $7.25 tariff rate and the prescribed maximum rate of $5.62, even though the Commission had not done so.

The questions presented are:

1. In declining to apply the new jurisdictional provisions of the Staggers Rail Act of 1980, did the decision of the Court of Appeals violate the principle that a court shall apply the law in effect at the time of its decision, as well as holdings of this Court that the withdrawal of jurisdiction from a lower tribunal by Congress must be given effect by a reviewing court?

2. Apart from whether the Staggers Act should have been applied in this case, did the decision of the Court of Appeals violate the pre-Staggers Act principle that private rate agreements are unenforceable, and the pre- and post-Staggers Act principle that the function of the Interstate Commerce Commission is to apply the public interest standards of the Interstate Commerce Act in determining a just and reasonable maximum rate—not to enforce an asserted rate agreement between a shipper and a railroad?

3. Did the decision of the Court of Appeals violate the holding of this Court in *Arizona Grocery Co.* v. *Atchison, Topeka & S.F. Ry.*, 284 U.S. 370 (1932), by awarding reparations based on a maximum rate *below* that prescribed by the Commission in a previous decision—a decision which had not been set aside by a reviewing court?

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[2] The following parties participated in the Court of Appeals proceedings below: Burlington Northern Inc.; Iowa Power and Light Company; The United States of America; and The Interstate Commerce Commission.

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The United States of America and The Interstate Commerce Commission,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Railroad Petitioner Burlington Northern Inc. respectfully prays that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on April 27, 1981, and a subsequent order of that court entered on May 8, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the Commission's decision is reported at 647 F.2d 796 (App. A). A subsequent order of the Court of Appeals, entered May 8, 1981, awarding IP&L rate reductions for past movements, is unreported (App. B). The decision of the Commission affirmed by the Court of Appeals, *Unit Train Rates on Coal–Burlington Northern Inc.*, is reported at 364 I.C.C. 186 (App. C). The Commission's 1979 decisions in the same agency proceeding are attached as Appendix D.

An order entered August 3, 1979, by the District Court for the Southern District of Iowa denying IP&L's motion for a preliminary injunction (*Iowa Power & Light Co.* v. *Burlington Northern, Inc.*) is attached as Appendix E. A decision by the Court of Appeals, reversing the District Court's order and holding that it had jurisdiction to issue an injunction, was served February 12, 1980 (App. F).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 27, 1981. A timely petition for rehearing was denied on July 20, 1981 (App. G). This Court has jurisdiction under 28 U.S.C. §§1254(1) and 2350(a).

STATUTORY PROVISIONS

The statute involved is the Staggers Rail Act of 1980 (Pub. L. No. 96-448, 94 Stat. 1895 (1980)). The pertinent provisions of this statute are set forth in the statutory appendix.

STATEMENT OF THE CASE

This case grows out of a controversy between Burlington Northern Inc. ("BN") and Iowa Power and Light Company ("IP&L") as to the freight rate to be paid to BN for the annual movement of 2.7 million tons of coal in unit trains from Belle Ayr, Wyoming, to an IP&L electric generating plant at Council Bluffs, Iowa. IP&L decided to construct a generating plant at Council Bluffs in 1972, and thereafter sought to purchase coal and arrange for transportation (App. A at A-2).

On June 15, 1973, IP&L signed a letter of intent to purchase coal for its plant from Amax Coal Company's Belle Ayr, Wyoming, mine (which, like IP&L's Council Bluffs plant, is served by BN). IP&L then contacted BN concerning the freight rate that would be charged once the coal movement started four and one-half years later, in 1978. On July 10, 1973, BN quoted the rate it was willing to publish at that time. On July 25, 1973, IP&L approved BN's rate quotation, but no agreement was reached as to how the quoted rate would be changed in the future. On August 31, 1973, IP&L signed a formal coal purchase contract with Amax.

In late 1975, IP&L approved a rate escalation formula proposed by BN. On January 7, 1976, BN sent IP&L a "letter of understanding" which set forth the quoted base rate and the escalation formula. IP&L acknowledged receipt of the letter on February 16, 1976 (App. C at C-6). By 1979, the "letter of understanding" rate, through escalation, had become $5.62 per ton (App. C at C-7 & n.8).

During the time IP&L was engaging in negotiations with Amax and BN, rate contracts between shippers and carriers were regarded as unlawful and unenforceable. In *Contract Rates on Rugs and Carpeting from Amsterdam, N.Y. to Chicago*, 313 I.C.C. 247 (1961), *aff'd sub nom. New York Central R.R.* v. *United States*, 194 F.Supp. 947 (S.D.N.Y. 1961), *aff'd per curiam*, 368 U.S. 349 (1962), the Commission had held that contract rates constituted a "destructive competitive practice" in violation of the National Transportation Policy (49 U.S.C. §10101). In *Guaranteed Rates from Sault Ste. Maine, Ontario to Chicago*, 315 I.C.C. 311, 323 (1961), the Commission had ruled that "in the absence of a statutory amendment, contract rates and agreed charges are deemed unlawful *per se*."[1]

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[1] The 1961 decisions were fully consistent with previous decisions involving contract rates. *See, e.g., Lumber from and to Hampton & Branchville Railroad*, 264 I.C.C. 419, 425 (1946); *Shreveport Chamber of Commerce* v. *Gulf, Colorado & Santa Fe Railway*, 201 I.C.C. 73, 74 (1934); *H. P. Hood & Sons* v. *Delaware & Hudson Co.*, 17 I.C.C. 15, 18-19 (1909); *Beatrice Creamery Co.* v. *Illinois Central Railroad Co.*, 15 I.C.C. 109, 128 (1909).

The Commission continued to rule that contract rates were illegal and unenforceable into the 1970's. *See, e.g., Contract Service Charges*

(Footnote continued on following page)

The Commission's rulings were in accordance with decisions of this Court and lower courts holding private rate contracts to be illegal and unenforceable under the Interstate Commerce Act. For example, in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338 (1956), this Court had stated that "the Interstate Commerce Act . . . in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts" [citing *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908)].[2]

In 1977, IP&L notified BN that coal movements would begin on January 1, 1978. BN proposed to publish a rate of $7.38 per net ton, which was *higher* than the rate determined pursuant to the 1976 "letter of understanding." Although IP&L understood that the 1976 understanding was *not* enforceable,[3] it did not concur in this proposal. BN then published a tariff schedule with the Commission setting forth the "letter of understanding" rate in

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(Footnote continued from previous page)
Between New Jersey Points, 346 I.C.C. 10, 15-16 (1973); *Ormet Corp.* v. *Illinois Central Railroad*, 341 I.C.C. 647 (1972); *Great Lakes Ship Owners Association* v. *Chicago & N.W. Ry.*, 337 I.C.C. 287, 291-292 (1970); 341 I.C.C. 272, 277 (1972).

[2] *See also National Gypsum Co.* v. *United States*, 353 F.Supp. 941, 949 (W.D.N.Y. 1973).

[3] IP&L has conceded its awareness that rate contracts were unenforceable at the time the purported "letter of understanding" between IP&L and BN was signed (Rebuttal Statement of Argument of IP&L in *Incentive Rate on Coal—Belle Ayr, Wyoming to Council Bluffs, Iowa*, ICC Docket No. 36792, at 2):

> "Prior to passage of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), the Commission held that a contract between a carrier and shipper to institute a particular rate level *is not binding*."*
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>
> *"*See, e.g., Farley Terminal Company* v. *Atchison, Topeka and Santa Fe Railway Co.*, 522 F.2d 1097 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975); *Colorado Alfalfa Meal Manufacturing Co.* v. *Missouri Pacific Ry.*, 41 I.C.C. 540, 544 (1916)" (emphasis added).

order to allow the movements of coal to commence, but announced its intention to file a tariff implementing the $7.38 rate (App. A at A-4).

On May 23, 1978, the Commission issued a notice proposing to reverse its prior policy and to permit contract rates. *Change of Policy, Railroad Contract Rates*, Ex Parte No. 358 (43 *Fed. Reg.* 22148). The Commission explicitly recognized that its notice "represents a change in policy" (*id.* at 22149).

On August 9, 1978, BN published a tariff with the Commission setting forth $7.38 as the rate for the Council Bluffs movement. IP&L immediately filed a petition for suspension and investigation of the rate.[4] The Commission granted IP&L's petition after an informal hearing, and suspended the $7.38 rate for the maximum ten-month period allowable under 49 U.S.C. §l0707(b)(1) (App. A at A-5). Under this statutory provision, the filed rate would automatically become effective (unless found to be unlawful) ten months later, on July 6, 1979.

During its investigation of BN's rate the Commission adopted the new policy permitting contract rates that it had proposed in May 1978 in Ex Parte No. 358 (statement served November 9, 1978, 43 *Fed. Reg.* 58189). The Commission's new policy was purely prospective.

On July 3, 1979, three days before the ten-month period for the Commission's investigation of the $7.38 rate expired, IP&L obtained an *ex parte* order from an Iowa state court, which enjoined BN from collecting the filed tariff rate of $7.38 (App. E at E-1). However, under Section 10707(b)(1) of the Interstate Commerce Act, this stay did not prevent the $7.38 rate from taking effect as the lawful rate on July 6, 1979.

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[4] I.&S. Docket No. 9199, *Unit Train Rates on Coal—Burlington Northern Inc.* IP&L also filed a complaint attacking the rate (Docket No. 36944, *Iowa Power and Light Co.* v. *Burlington Northern Inc.*).

The Commission's First *Iowa Power* Decision

On July 6, 1979, the Commission issued a short order announcing that it had found unlawful the proposed $7.38 rate and had prescribed $7.25 (a rate *above* the asserted agreement level) as the maximum reasonable rate (App. D at D-39–D-41). One week later, the Commission issued its full decision in which it *declined* to enforce the asserted agreement-level rate as the maximum reasonable rate (*id.* at D-1). BN was directed to reduce the $7.38 rate to $7.25, effective August 13, 1979 (*id.* at D-37).[5] In reaching its decision, the Commission found that BN had market dominance over the traffic in question pursuant to the standards of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210.[6] The Commission expressly rejected IP&L's request that the rate provided for in the 1976 "letter of understanding"—which had increased to $5.62 pursuant to the letter's escalation formula—be enforced as the maximum reasonable rate (*id.* at D-12):

> "The Commission has recently changed its policy to allow carriers to file tariffs proposing contract rates [referring to its 'policy statement' in Ex Parte No. 358, discussed *supra* at p. 5]. . . . Unfortunately, the negotiations between these parties occurred before issuance of our policy statement. . . . In these circumstances the Commission can only consider whether the proposed rates exceed a reasonable maximum."

IP&L sought review of the Commission's decision in the United States Court of Appeals for the Eighth Circuit on July 6, 1979.

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[5] For convenience, this petition follows the Commission and the Court of Appeals' practice of referring only to the "$7.38" and the "$7.25" rates, although general rate increases (which are not at issue here) have been permitted to take effect by the Commission since the July 1979 decision, thereby increasing these rates.

[6] "Market dominance" was defined in the 1976 statute as the "absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies" (49 U.S.C. §10709(a)).

Pending IP&L's separate appeal of its injunction claim,[7] the Court of Appeals ordered IP&L to pay into an interest-bearing escrow account the difference between the reduced tariff rate of $7.25 that the Commission had prescribed as a maximum and the $5.62 rate level provided for by the "letter of understanding" (*id.* at F-7). Thus, BN collected only $5.62 from IP&L, although the Commission-prescribed maximum rate—and the lawful effective tariff rate—was $7.25.

On February 12, 1980, a divided panel of the Court of Appeals ruled on IP&L's injunction claim (App. F). By a 2-to-1 vote, the court held that the district court did have the power to issue the injunction requested by IP&L, and remanded the injunction case for further proceedings. However, on March 21, 1980, the court granted the petition of the Commission for a rehearing *en banc*, and the injunction case was later consolidated with the petitions for review challenging the Commission's July 1979 decision (App. A at A-2, A-3, A-27).

On February 21, 1980, the Commission served a further decision in its "Change of Policy" proceeding (Ex Parte No. 358) with respect to contract rates (45 *Fed. Reg.* 21719). The Commission acknowledged that in certain coal rate cases decided after adoption of its 1978 policy change on contract rates (including the *Iowa Power* case), it had "determined the reasonableness of the changes [in pre-1978 rates] under ordinary standards," and had "declined to consider claims by shippers that the charge was in excess of previously executed contracts with the shippers" (*id.*). It also conceded that the lawfulness of pre-1978 contracts "was somewhat uncertain when the parties entered into them." Nonetheless, the Commission proceeded to *reverse* its approach as to rate understandings negotiated prior to the 1978 "change of policy." In the future, the Commission announced, it would give "great weight" to pre-1978 agreements in prescribing maximum reasonable rates (*id.* at 21720).

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[7] On July 6, 1979, BN removed the Iowa state injunction proceeding to the United States District Court for the Southern District of Iowa (App. F at F-5). That court denied IP&L's motion for a preliminary injunction, but continued the stay issued by the Iowa state court pending IP&L's appeal of the denial to the United States Court of Appeals for the Eighth Circuit.

To apply its new "policy" retroactively, the Commission requested the Court of Appeals for the Eighth Circuit to remand the review proceedings involving the Commission's July 1979 *Iowa Power* decision for further consideration. The Court of Appeals granted the Commission's motion on May 7, 1980 (App. A at A-5-A-6).

The Staggers Rail Act of 1980

While the Commission was reconsidering the *Iowa Power* case, Congress enacted the Staggers Rail Act of 1980, Public Law No. 96-448. The Staggers Act altered the Commission's jurisdiction in two significant respects. First, the Staggers Act substantially reduced the Commission's maximum rate jurisdiction over railroad rates by eliminating its power to find market dominance with respect to—and thus removing its power to impose—a rate less than 160 percent of variable costs (Section 202).[8] Second, Congress authorized railroads and shippers to enter into rate agreements, while preserving whatever legal status pre-Staggers Act contracts may have possessed (49 U.S.C. §10713(j)). Moreover, state and Federal courts were given the *exclusive* jurisdiction to enforce such contracts (49 U.S.C. §10713(i)(2)).[9] Under Section 710(a) of the Act, these new jurisdictional limitations became effective October 1, 1980.

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[8] Section 202 of the Staggers Act, now codified at 49 U.S.C. §10709(d), provides in pertinent part:

> "(2) In making a determination under this section, the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than—
>
> > (A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and ending September 30, 1981 . . ."

The Commission's Second *Iowa Power* Decision

The Commission served its second *Iowa Power* decision on October 1, 1980—the date on which the Staggers Act became effective (App. C). In its decision, the Commission changed its mind, vacated its first decision, and prescribed as the maximum rate the "letter of understanding" rate of $5.62 *to the penny*, ordering BN to reduce its tariff to that level (*id.* at C-10, C-16, C-17). The Commission did *not* order BN to pay any reparations for the year during which the tariff rate of $7.25—which the Commission had previously prescribed as the lawful maximum—had been in effect; nor did it find that any portion of the escrow fund should be paid back to IP&L (*id.* at C-17). After its stay requests to the Commission and to the courts had been denied, BN published the $5.62 rate, which became effective on November 4, 1980. IP&L thereafter ceased its payments into the escrow account established by the Court of Appeals.

The Decision of the Court of Appeals

BN petitioned for review of the Commission's second *Iowa Power* decision, and the Court of Appeals consolidated all of the pending appeals from the Commission proceedings.[10]

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[9] Section 208 of the Staggers Act, now codified at 49 U.S.C. §10713(i)(2) provides:

> "The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree."

[10] IP&L also petitioned for review of the Commission's second decision. However, IP&L moved on November 12, 1980, to dismiss its petitions for review of both decisions, and the Court of Appeals granted that motion on December 2, 1980.

On April 27, 1981, the Court of Appeals issued its decision (App. A). The court denied BN's petition for review of the Commission's second *Iowa Power* decision, and affirmed the Commission's prescription of the "letter of understanding" rate level of $5.62 as the maximum reasonable rate.[11] The court ruled that the jurisdictional limitations of the Staggers Act were inapplicable to the Commission's October 1, 1980, decision, although the Commission had not urged such a holding (*id.* at A-10–A-16). Because the Commission had in effect enforced the contract rate, the Court of Appeals dismissed IP&L's injunction claim as moot (*id.* at A-28).

On May 8, 1981, prior to the filing of any petitions for rehearing and without notice to BN, the Court of Appeals issued a further two-sentence order directing disbursement of the escrow fund to IP&L "upon receipt of this Court's mandate" (App. B). BN filed a petition to vacate this order on May 26, 1981. In a one-sentence order dated July 20, 1981, the Court of Appeals denied the petition, as well as BN's timely petition for rehearing of the April 27, 1981 decision (App. G).[12]

* * *

Against this background, several facts critical to the proper disposition of this petition emerge with clarity: (1) in 1979 the Commission ruled that the 1976 "letter of understanding" was *not* an enforceable contract, and that this "letter of understanding" rate level was *not* the maximum reasonable rate; (2) Congress changed the law in 1980 by providing, *inter alia*, that the Commission had *no* jurisdiction to enforce contract rates or to prescribe rates below 160 percent of variable cost; (3) simultaneously, the Commission prescribed an asserted contract rate as the maximum reasonable rate even though the rate-variable cost ratio thus produced was far below 160 percent; and (4) the Court of Appeals in 1981 affirmed the decision on the ground that the jurisdictional limits of the Staggers Act were not yet applicable.

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[11] BN had argued to both the Commission and the Court of Appeals that the "letter of understanding" was *not* an enforceable contract because, *inter alia*, of lack of consideration and lack of intent to contract. The Commission did not refer to BN's contract defenses in its October 1, 1980, decision, and the Court of Appeals declined to consider them on the theory that "the Commission's October 1, 1980, decision enforcing the agreed rate was not based on contract law" (App. A at A-19 n.20).

[12] BN moved on July 27, 1981 to stay the Court of Appeals' mandate pending BN's petition for writ of certiorari. That motion was denied on August 17, 1981. BN then petitioned this Court to stay the mandate below pending review of BN's petition for certiorari. That application was denied on August 28, 1981.

REASONS FOR GRANTING THE WRIT

There are compelling reasons why this petition should be granted. First, the decision of the Court of Appeals is flatly inconsistent with prior rulings of this Court and courts of appeals other than the Eighth Circuit as to (1) the application of a newly enacted jurisdictional statute to a case pending before an appellate court, (2) the lack of power of the Commission to enforce rate agreements, and (3) the lack of power of a court to award reparations.

Second, the decision of the Court of Appeals is inconsistent with the recent holdings of two other federal courts that the Staggers Rail Act of 1980 *does* apply to pre-Staggers Act rate agreements, and that it deprives the Commission of any jurisdiction to enforce such agreements. Moreover, the same jurisdictional issues are presented in at least six cases pending before four different courts of appeals.[11] In view of these pending cases (and the cases which are likely to arise in the future because of the large number of pre-Staggers Act alleged rate agreements between railroads and shippers), the conflict between the decision of the Court of Appeals below and the holdings of the other two courts should be resolved.

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[11] *Southwestern Electric Power Co.* v. *Burlington Northern Inc.*, 5th Cir., No. 79-3049; *Cleveland-Cliffs Iron Co.* v. *United States*, 6th Cir., Nos. 79-3775, *et al.*; *Hanna Mining Co.* v. *Escanaba and Lake Superior Railroad Co.*, 6th Cir., No. 80-1681; *Cleveland-Cliffs Iron Co.* v. *Chicago & North W. Transportation Co.*, 6th Cir., No. 81-8031; *Metallurg, Inc.* v. *Burlington Northern Inc.*, 8th Cir., No. 81-1478; *Burlington Northern Inc.* v. *United States*, D.C. Cir., No. 79-1547.

Review is also necessary in order that the policies underlying the Interstate Commerce Act and the Staggers Act be effectuated. The issues presented in this case involve substantial revenues (even assuming that no additional cases involving pre-Staggers Act rate agreements were pending) for the railroad industry in general, and for BN in particular. In order that railroads which are earning inadequate revenues, including BN, might survive as private enterprises, Congress in the Staggers Act substantially deregulated railroad freight rates by cutting back the Commission's maximum rate jurisdiction. The Court of Appeals' decision directly violates these provisions, and contradicts the purpose of the Act. As petitioner will demonstrate below, this Court should grant this petition to ensure the proper implementation of the Staggers Act, as well as to resolve a conflict among the Federal courts on important jurisdictional issues and the enforceability of pre-Staggers Act rate agreements under the Interstate Commerce Act.

I. The Decision of the Court of Appeals Not To Apply the Jurisdictional Provisions Of the Staggers Rail Act of 1980 Is Contrary To the Holdings of This Court and Other Federal Courts.

The Staggers Rail Act of 1980 became effective on October 1, 1980—the very day the Commission issued its decision in this case, and six months *prior* to the affirmance of that decision by the Court of Appeals. The Staggers Act eliminated *any* Commission jurisdiction either (1) to impose a rate that is less than 160 percent of variable costs as of October 1, 1980, or (2) to enforce a rate agreement.

On appeal, both BN and the Commission argued that the provisions of the Staggers Act were applicable to this case, although their interpretations of the provisions of the Act differed. The Court of Appeals, however, held in its decision of April 27, 1981, that the Staggers Act was *inapplicable* to this case. That holding is directly contrary to the principle that courts apply the law as it exists at the time of decision and, even more importantly, to the rulings of this Court that the enactment of a statute withdrawing jurisdiction from a lower tribunal *must* be given effect by an appellate court. The holding below is also in conflict with the decisions of two federal courts applying the Staggers Act, and holding that it eliminates any Commission jurisdiction to enforce alleged pre-Staggers Act rate agreements.

In Section 202 of the Staggers Act, Congress narrowed the Commission's jurisdiction in furtherance of the Congressional goal of "greater reliance on the marketplace" by creating a rate-to-variable cost threshold for any exercise of the Commission's jurisdiction (H. Rep. No. 96-1430, 96th Cong., 2d Sess. 80 (1980)):

> "Specifically, Title II provides the Interstate Commerce Commission with jurisdiction to determine rate reasonableness *only* when a rail carrier has market dominance *and* the rate exceeds the applicable revenue-variable cost percentage threshold. *The revenue-variable cost percentage is a level below which the Commission has no jurisdiction over the reasonableness of maximum rates.*" (Emphasis supplied.)

Section 202 thus plainly provides that, as of October 1, 1980, the Commission had no jurisdiction to enter a finding of market dominance, or to determine the maximum reasonableness of a rate, unless that rate would yield a revenue-variable cost percentage equal to or greater than 160 percent. In this case, however, the Commission prescribed a maximum reasonable rate ($5.62) which was *only 123 percent* of variable cost ($4.56), as determined by the Commission (App. C at C-9).

Section 208 of the Staggers Act provides that railroads and shippers may enter into rate agreements, subject to certain statutory requirements, and preserves whatever status pre-Staggers Act rate agreements possessed (49 U.S.C. §10713(j)). At the same time, Congress expressly provided that the *exclusive* remedy for enforcement of any such agreements, whether pre- or post-Staggers Act, would henceforth be in a state or Federal court—*not* in the Commission. This section contains no exceptions (49 U.S.C. §10713(i)(2)):

> "The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in appropriate State Court or United States district court. . . ."

Although Sections 202 and 208 of the Staggers Act divested the Commission of jurisdiction to prescribe a rate below 160 percent of variable cost, or to enforce a rate agreement, the Commission did *both* in its October 1, 1980, decision. The Court of Appeals, however, held that the Staggers Act did not apply to that decision (App. A at A-10):

> "We believe that the parties' respective reliance on Sections 202 and 208 is misplaced. Both BN and the ICC assume that the Staggers Rail Act applies here although with disagreement as to which section of the Act determines the ICC's jurisdiction. We conclude to the contrary that the Staggers Rail Act is not applicable.*
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> "*Given this conclusion, we do not reach the questions (1) whether Section 208 of the Staggers Rail Act should be read as a jurisdictional provision; (2) whether Section 208 creates a 'contract' exception to the jurisdictional thresholds of section 202; (3) whether contract rights preserved by subsection (j) of Section 208 are enforceable by the Commission or the courts."

In so ruling, the Court of Appeals acted contrary to the general principle that an appellate court applies the law in effect at the time it makes its decision. *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 712-713 (1974); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969).

In the case of *jurisdictional* statutes, this principle is clearly unqualified. Where a statute enacted during an appeal divests the lower tribunal of jurisdiction, and that statute contains no savings clause as to pending cases, the appellate court *must* apply that statute, *without exception.* In *Bruner* v. *United States*, 343 U.S. 112 (1952), *Smallwood* v. *Gallardo*, 275 U.S. 56 (1927), and *Hallowell* v. *Commons*, 239 U.S. 506 (1916), this Court established and applied the rule that the removal of jurisdiction from a lower tribunal by Congress requires the reviewing court to vacate any decision by the lower tribunal that is based upon any jurisdictional provisions thus withdrawn. As Justice Frankfurter wrote for this Court in *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386, 390 (1953):

> "*When the very purpose of Congress is to take away jurisdiction, of course, it does not survive, even as to pending suits, unless expressly reserved. Ex parte McCardle*, (US) 7 Wall 506, is the historic illustration of such a withdrawal of jurisdiction, of which less famous but equally clear examples are *Hallowell* v. *Commons*, 239 U.S. 506, and *Bruner* v. *United States*, 343 U.S. 112. *If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit.*" (Emphasis supplied.)[14]

Similarly, as Justice Holmes observed in *Smallwood* (275 U.S. at 62):

> ". . . it does not matter that these cases had gone to a higher Court. When the root is cut the branches fall."

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[14] This principle has consistently been applied by at least five courts of appeals. *See Merge* v. *Troussi*, 394 F.2d 79, 82-83 (3rd Cir. 1968) ("under [*Bruner, Smallwood, and Hallowell*], the [reviewing] court loses all jurisdiction even in a case already pending, when Congress amends the governing statute by taking jurisdiction from the courts"); *Brotherhood of Railroad Trainmen* v. *Denver R.R. & L.R. Co.*, 54 CCH Lab. Cas. ¶11,642 (10th Cir. 1966) (" it has specifically been held that the repeal of a law conferring jurisdiction, absent a savings clause for pending cases, destroys jurisdiction in pending cases," citing *Bruner*); *Upton* v. *United States*, 199 F.2d 366 (4th Cir. 1952) (loss of lower forum's jurisdiction requires that a reviewing court vacate the judgment below); *Barthelemy* v. *J. Ray McDermott & Co., Inc.*, 537 F.2d 168, 172 (5th Cir. 1976) (applying *De La Rama* to Congress' withdrawal of jurisdiction from deputy commissioners of the Department of Labor's Bene-

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The Court of Appeals violated these rulings in the present case. The Court of Appeals offered three reasons for its conclusion that the Staggers Act was inapplicable: (1) the ninety-day period within which the Commission, under 49 U.S.C. §10709 (b), must make a determination as to market dominance began when the Commission started this proceeding in 1978 and thus had long since passed; (2) the legislative history of the Staggers Act indicated that case law should control the effect of the Staggers Act on pending cases; and (3) under that case law, "manifest injustice" would result from retroactive application of the new Act, and the Act's effect should therefore be purely prospective (App. A at A-10–A-16).

Each of the reasons given by the Court of Appeals was clearly erroneous. First, although Section 10709(b) requires the Commission to make a market dominance determination within 90 days of the initiation of a proceeding, it does not prohibit the Commission from later reconsidering and making a *new* market dominance determination. Indeed, in its October 1, 1980 decision the Commission *did* reexamine the market dominance issue and made a new market dominance determination (App. C at C-15).

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fits Review Board); *Matter of District of Columbia Workmen's Compensation Act*, 554 F.2d 1075, 1079 & n.17 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976) ("undeniably, if the District Court lost jurisdiction, we also are without jurisdiction," citing *Bruner*, *Smallwood* and *Hallowell*); *de Rodulfa* v. *United States*, 461 F.2d 1240, 1251, 1255 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972):

> "*These appeals face, too, not changes merely affecting the merits of the cases or their procedural incidents, but what is indeed a complete withdrawal of jurisdiction* to reexamine any determination by the Administrator in wartime death compensation cases. . . . *It is clear to us beyond peradventure that these appeals fell when Congress changed Section 211(a).*
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> "The vital difference between an alteration of substantive legislation . . . and legislation wholly jurisdictional in character is vividly illustrated by *De La Rama Steamship Company* v. *United States*."(Emphasis supplied.)

Second, although the Court of Appeals was correct in finding that Congress intended the effect of the Staggers Act to be governed by the case law, it failed to recognize that *Bruner* and other decisions of this Court require retroactive application of a statute divesting a lower tribunal of jurisdiction.

Finally, the "manifest injustice" exceptions set forth in *Bradley* and relied upon by the Court of Appeals are not applicable in the present case, because the Staggers Act is a *jurisdictional* statute.[15] The Court of Appeals failed to recognize that the *Bradley* exceptions apply only to changes in *substantive* law. The decision of the Court of Appeals was thus clearly contrary to the holdings of *Bruner* and *Smallwood*. Those cases do not permit a reviewing court to affirm a decision of a lower Federal forum which has lost jurisdiction to enter the order under review, absent an express statutory exception.[16]

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[15] *See Hospital Ass'n of New York* v. *TOIA*, 435 F. Supp. 819, 831 (S.D.N.Y. 1977):

> "Given the clear rule that Congress has power at any time to withdraw jurisdiction from the Federal courts in pending cases, it does not seem to us that *Bradley* is relevant, *even if plaintiffs could establish that the repealer legislation worked a 'manifest injustice' upon them*." (Emphasis supplied.)

[16] Even if the Court of Appeals below were correct in applying the *Bradley* exception instead of the *Bruner-Smallwood* rule—and it was not—it clearly erred in concluding that each of the three parts of the *Bradley* "manifest injustice" exception were met in the present case.

First, the Court of Appeals erred in concluding that application of the Staggers Act in the present case was not a "great national concern" because the Commission-imposed rate level assertedly covered BN's costs (App. A at A-13–A-14). Congress expressly addressed the national problem of railroad revenue inadequacy in the Staggers Act, and in determining the extent to which rates were to be deregulated, did *not* categorize railroad movements into those which are "compensatory," and those which are not. Instead, it deregulated *all* rates that are below 160 percent of their variable cost in order that railroads could earn adequate revenues overall, and thus remain economically viable.

Second, the statement of the Court of Appeals that application of the Staggers Act would "infringe upon a right that had matured or become

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Beyond its clear conflict with *Bruner* and other withdrawal-of-jurisdiction cases, the decision of the court below is also inconsistent with the holdings of two other federal courts *applying* the Staggers Act to pre-Staggers Act rate agreements. Both courts have applied the Act, and concluded that Section 208 divests the Commission of any jurisdiction to enforce agreements as to maximum rates. In *Metallurg, Inc.* v. *Burlington Northern Inc.*, No. 3-81 Civ. 39 (D. Minn., April 20, 1981), the district court held that the Commission lacks the power to adjudicate disputes concerning pre-Staggers Act rate agreements (slip opinion at 5):

> "The statute provides unequivocally that a contract entered into prior to the Act shall be treated the same as a contract entered into under the provisions of the Act. *And if a contract entered into under the provisions of the Act has as its exclusive remedy for any alleged breach an action in the United States district court, it must naturally follow that a contract entered into before the effective date has the same exclusive remedy.*" (Emphasis supplied.)

In *Cleveland-Cliffs Iron Co.* v. *Chicago & N.W. Transportation Co.*, 516 F.Supp. 399, 407 (W.D. Mich. 1981), the district

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unconditional" [referring to the *IP&L* market dominance finding] (*id.* at A-14–A-15) begs the question. Prior to issuance of the Court of Appeals' opinion reviewing the decision of the Commission, IP&L had no "right" to the $5.62 rate; and it plainly *never* had any "right" or immunity from Commission reconsideration of the market dominance issue, or from a Congressional change in the Commission's jurisdiction.

Finally, the Court of Appeals erred in concluding that IP&L would be injured because "new and unanticipated obligations [might be imposed] upon a party without notice or an opportunity to be heard" (*id.* at A-15–A-16). IP&L *does* have a forum in the courts under Section 208 of the Staggers Act if it can show that pre-Staggers Act rate understandings were enforceable contracts. Consequently, IP&L is not being protected from a loss of an opportunity to be heard, but only from the "burden" of pursuing its remedy in the only proper forum. The Court of Appeals for the District of Columbia Circuit recognized this principle when it declined to apply *Bradley's* "manifest injustice" exception to a situation involving a change in jurisdiction. *See Eikenberry* v. *Callahan*, 653 F.2d 632 (D.C. Cir. 1981).

court similarly ruled that the Staggers Act has divested the Commission of jurisdiction to determine whether a pre-Act rate agreement reflects a reasonable maximum rate:

> "The ICC also asserts that it has primary jurisdiction to implement a policy that carriers are entitled to a reasonable maximum rate with respect to pre-Act contracts. *The court finds no basis for such jurisdiction in the language or the policies of Section 208 of the Staggers Act.*" (Emphasis supplied.)

The holdings of *Metallurg* and *Cleveland-Cliffs* clearly conflict with the decision of the Court of Appeals. This conflict is likely to continue in the pending cases in the courts of appeals which present the same issues. Unless the conflict is resolved at this time, this multiple litigation will continue, and it is highly likely that many petitions for certiorari will present the same issue to this Court in the future.

II. The Decision of the Court of Appeals Affirming Commission Enforcement of an Asserted Private Rate Agreement Is Contrary To the Well-Established Principle That the Function of the Commission Is To Enforce the Statutory Standards of Maximum Rate Reasonableness—Not To Enforce Private Rate Agreements.

Apart from the Court of Appeals' error in holding that the provisions of the Staggers Rail Act of 1980 are inapplicable to this case, it also erred in holding that, under pre-Staggers Act law, private rate agreements were legal and enforceable, and that the Commission fulfilled its obligation to apply statutory rate-making standards in determining maximum reasonable rates when it enforced a rate set forth in a private "letter of understanding" between BN and IP&L. This Court and other courts of appeals have consistently held to the contrary.

Under the provisions of the Interstate Commerce Act, railroads are considered common carriers and are required to serve all shippers under tariffs filed with the Commission. Railroads may not charge a rate different from that specified in the tariff (49 U.S.C. §10761(a)). Any rate charged by a railroad "must be reasonable" (*id.* at §10701(a)). If the Commission finds that a rate is unreasonable, it may prescribe a maximum rate to be followed (*id.* at §10704(a)(1)). The Commission is *required* to establish rates which will enable the railroads to attain adequate revenues (*id.* at §10704(a)(2)). Prior to the enactment of the Staggers Act, the Interstate Commerce Act contained *no* provision authorizing contracts between railroads and shippers. Although the Staggers Act now authorizes railroads and shippers to enter into rate contracts, it vests the power to enforce such contracts exclusively in the courts (49 U.S.C. §10713(i)(2)).

Under these provisions, therefore, the function of the Commission was—and under the Staggers Act remains—to determine whether rates are reasonable and consistent with the public interest in light of the statutory standards embodied in the Rule of Ratemaking (49 U.S.C. §10704(a)(2)). These provisions do not empower the Commission to enforce private rate contracts—as this Court and the courts of appeals have recognized. For example, in *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956), this Court ruled that under the Natural Gas Act (which, *unlike* the Interstate Commerce Act prior to 1980, required the filing of rate contracts and empowered the Federal Power Commission to fix the terms of such contracts), contract rates could not be changed unless and until the FPC had found them unjust and unreasonable. This Court expressly observed that the Interstate Commerce Act "precludes private rate agreements" (*id.* at 338-339):

> "*In construing the [Natural Gas] Act, we should bear in mind that it evinces no purpose to abrogate private rate agreements as such.* To the contrary, by requiring contracts to be filed with the [FPC], the Act expressly recognizes that rates to particular customers may be set by individual contracts. *In this respect, the Act is in marked contrast to the*

> *Interstate Commerce Act, which in effect precludes private rate agreements* by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts. *See Armour Packing Company* v. *United States,* 209 U.S. 56. The *Commission in its brief recognizes this basic difference between the two Acts and notes the differing natures of the industries which gave rise to it.*"[17] (Emphasis supplied.)

Indeed, *United Gas* was relied upon by this Court just last term in *Arkansas Louisiana Gas Co.* v. *Hall*, 101 S.Ct. 2925 (1980), which held that the "filed rate doctrine" *bars* a carrier from bringing a breach-of-contract action against a shipper to collect a rate provided for in a contract but inconsistent with the rate filed with the agency.[18]

The decision of the Court of Appeals in the instant case is also in flat conflict with the recent decision of the Court of Appeals for the District of Columbia Circuit, *American Broadcasting Companies, Inc.* v. *FCC*, 643 F.2d 818 (D.C. Cir. 1980) (*ABC*). The situation in *ABC* was strikingly similar to the instant case. ABC and CBS use communications common carriers to transmit television and radio signals via microwave facilities. In 1972, ABC and CBS entered into private contracts with Midwestern Relay

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[17] *See also, e.g., Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908); *Aero Trucking* v. *Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979); *Illinois Central Gulf R.R.* v. *Golden Triangle Wholesale Gas Co.*, 586 F.2d 588 (5th Cir. 1978); *Farley Terminal Co., Inc.* v. *Atchison, T. & S. F. Ry. Co.*, 522 F.2d 1095 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975).

[18] This Court's decision in *Arkansas Louisiana Gas Co.*, which was decided after the decision below, demonstrates that the Court of Appeals was incorrect in disregarding this Court's holding in *United Gas*. The Court acknowledged that the Natural Gas Act (*unlike* the Interstate Commerce Act) requires the filing of rate contracts between regulated carriers and shippers, and does not abrogate existing contractual agreements (101 S.Ct. at 2933). Both the majority opinion of Justice Marshall and the dissenting opinion of Justice Stevens cited with approval the portion of the Court's statement in *United Gas* holding that the pre-Staggers Interstate Commerce Act *precluded* rate contracts between railroads and shippers (*id.* at 2933, 2940 n.19).

Company specifying the rate levels for service. The contracts were for 5-year terms. The contracts provided that the carrier would not, during the period of the contract, file any tariff inconsistent with the terms of the contract. Midwestern Relay Company initially filed a tariff with the FCC setting forth the agreed-upon rate. However, several years after the tariff became effective, but within the contract period, Midwestern decided that the rates were inadequate. Accordingly, it filed a revised tariff incorporating proposed higher charges (*id.* at 819-820).

ABC and CBS each protested and asked the FCC to reject the revised tariff, relying on their private agreements with the carrier. The FCC ruled in favor of the carrier, holding that statutory standards rather than private agreements were controlling (*id.* at 820):

> "[I]n determining whether Midwestern's tariff revision is unlawful on its face *we can give no weight to the mere fact that this revised tariff may conflict with the contract between Midwestern and petitioners.*" (Emphasis supplied.)

The Court of Appeals for the D.C. Circuit affirmed the FCC's decision. The court based its analysis almost entirely on the legislative history of, and precedents decided under, the Interstate Commerce Act, since the Communications Act of 1934 had borrowed its language and purpose from that Act (*id.* at 820-821). The court concluded that the Interstate Commerce Act "makes no provision for" rate contracts or agreements, and that such agreements are therefore not "permissible" (*id.* at 823):

> "The Act, however, makes no provision for the filing of contracts between carriers and shippers. Since such contracts cannot be filed, it must follow that they are not a permissible means of establishing terms and conditions which override properly filed terms and conditions."

The court's holding in *ABC*, which is based squarely on the Interstate Commerce Act and decisions thereunder, is flatly inconsistent with the decision of the court below. Indeed, that conflict is itself sufficient reason for review by this Court.

The Court of Appeals attempted to distinguish *ABC*, and the decisions of this Court upon which *ABC* relies, by asserting that the "determinative feature" of those cases (App. A at A-17):

> ". . . is a conflict between the duly filed rate approved by the regulatory agency, and a different rate arising from a private agreement. . . . Here, *by contrast*, the ratemaking authority of the regulatory agency is not threatened by attempts to enforce a rate other than the legal tariff." (Emphasis supplied.)

The court below plainly misread *ABC*. As in the present case, *ABC* involved an attempt to persuade an *agency*—not a court—to enforce a rate agreement and to declare unlawful a rate allegedly inconsistent with that agreement. Thus, no "conflict" or threat to an agency's authority distinguishes *ABC* from the present case. On the contrary, their facts are for all practical purposes identical.

Indeed, in *ABC* the Court of Appeals for the District of Columbia Circuit squarely rejected the very contention posed by IP&L in the present case. The court held unequivocally that the agency could not even *consider* a rate agreement in passing on the reasonableness of a proposed tariff.[19]

Thus, *ABC* reached precisely the same question as did the court below—the power of the agency to enforce rate contracts—but reached the opposite conclusion.[20] More fundamental, however,

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[19] The court below acknowledged that a rate agreement cannot control the Commission's determination of a just and reasonable rate, but found that the Commission had merely "given weight" to the alleged agreement (App. A at A-19–A-20 & n.20). This finding fundamentally misreads the decision of the Commission. Here, the Commission *enforced to the penny* the precise rate derived by the formula set out in the "letter of understanding." Absent that letter, and the Commission's changed "policy" toward contract rates, it is clear that the Commission would not have reconsidered or changed its 1979 decision in this case, which had applied the statutory standards of reasonableness and prescribed a higher maximum rate level.

[20] The court below also attempted to distinguish *ABC* on the ground that it expressly declined "to construe the situation before the court as

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than the refusal of the Court of Appeals to recognize the holding of *ABC* was its total disregard of the fundamental principles reflected in this Court's decisions in *United Gas, supra,* and *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908), which *ABC* viewed as controlling (643 F.2d at 824).

ABC thus applied the settled principle that the pre-1980 Interstate Commerce Act precluded enforcement by the Commission of private rate agreements. Prior to the Staggers Act—and, now, plainly under the Staggers Act as well—the Commission's function is to determine maximum reasonableness under the statutory standards of reasonableness, *not* to enforce rate agreements. This Court should review this portion of the Court of Appeals' decision to eliminate the conflict between the circuits created by the decision below, and clarify the law applicable to the numerous cases in which the question of the enforceability of pre-Staggers Act rate agreements by the Commission is presented.[21]

III. By Awarding IP&L the Difference Between $7.25 and $5.62 For Past Shipments, the Decision of the Court of Appeals Violated This Court's Express Holding in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*

In its October 1, 1980, decision, the Commission did not order BN to pay reparations to IP&L from the $7.25 rate that had been

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one of consistency between a private contract and the effective tariff approved by the regulatory agency" (App. A. at A-18). In reality, however, the question reserved in *ABC* was whether a contract would preclude any inconsistent tariff if the contract had been filed as *part* of the original tariff (643 F.2d at 825 & n.8). The instant case also does not present that question (despite the court's assertion to the contrary) because the asserted contract here also was never filed with the Commission as part of the tariff.

[21] The court below was also incorrect in ruling that the Commission had not acted arbitrarily and capriciously in applying its February 21, 1980 "change of policy" retroactively to the 1976 "letter of understand-

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prescribed as a maximum in its 1979 decision, and had been filed by BN in its tariff pursuant to that decision. The Court of Appeals, however, awarded IP&L the $11 million escrow fund into which IP&L had paid the difference between the tariff rate of $7.25 and the agreement rate level of $5.62. This award amounts to an order of reparations which violates settled principles consistently applied by this Court. Indeed, the decisions of this Court in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932), and *Arkansas Louisiana Gas Co.* v. *Hall, supra*, flatly prohibit courts from granting reparations from Commission-prescribed maximum rates.

The principle that reparations from an Interstate Commerce Commission-prescribed rate level cannot be granted by *either* the Commission *or* the courts was first established almost fifty years ago in *Arizona Grocery*. There, this Court held clearly and unequivocally that, under constitutional principles, the Interstate Commerce Commission lacks power to amend retroactively its own earlier order and award reparations for a period during which a carrier was complying with Commission-prescribed maximum rates.[22] This Court reasoned that when the Commission pre-

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ing" (App. A at A-26–A-27). A regulatory agency may make new rules or policies retroactive only after considering carefully whether any benefits from retroactive application will outweigh the adverse effects which which retroactivity will cause to private interests. *See, e.g., SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); *Retail Wholesale, & Department Store Union, AFL-CIO* v. *NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966). In this case, the Commission gave *no consideration whatever* to the adverse effects and unfairness to BN or other railroads of making its new ruling or policy retroactive.

[22] *Arizona Grocery* protection applies to those rates which the Commission has affirmatively prescribed as maximums (as opposed to rates which the Commission declines to find unlawful because a complainant has failed to meet its burden of proof). The Commission's July 1979 *Iowa Power* decision affirmatively prescribed $7.25 as the maximum reasonable rate, expressly finding that $7.25 was a "[r]easonable maximum rate for the future" (App. D at D-33).

scribes maximum rates under the Interstate Commerce Act, "it speaks as the legislature, . . . its pronouncement has the force of a statute . . . [and it] is exercising a delegated power legislative in character" (284 U.S. at 386-87) (citing *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 335 (1920)).[23]

For these reasons, the Court ruled that there can be no award of reparations from Commission-prescribed maximum rates. If the Commission subsequently changes its policy respecting the reasonableness of a rate, it may only prescribe a new rate to be charged in the future (284 U.S. at 389). It "may not at a later time, . . . by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation" (*id.* at 390).

Arizona Grocery also held that a *court* may not retroactively amend a Commission order and award reparations when the Commission cannot do so. When the Commission acts in its legislative capacity, its order is entitled to the same judicial deference as would be given to an Act of Congress. "Neither carrier nor shipper could thereafter draw into question *in the courts* the conduct of the other if it conformed to the legislative mandate, save by an attack on the constitutionality of the statute" (284 U.S. at 388). (Emphasis supplied.)

The facts of *Arizona Grocery* are remarkably similar to those of the present case. In both cases, the Commission originally prescribed a rate as a maximum, and the carrier was obligated by law to charge, and did charge, no more than that rate until such time as the Commission entered another order changing that rate. In both cases, the Commission changed its policy at a later time, and lowered the carrier's lawful rate. In both cases, portions of the carrier's proceeds from the first lawful rate were then awarded to the shipper as reparations.[24] The facts of this case differ from *Arizona Grocery* only by virtue of the existence of the escrow fund.[25] The existence of that fund, however, does not distinguish

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[23] The Commission's prescription of rates as a maximum differs from a legislative determination in that it is subject to judicial review (284 U.S. at 386 n.15). *See also Feinstein* v. *N.Y. Central R. Co.*, 159 F.Supp. 460, 465 (S.D.N.Y. 1958). Here, however, the Commission's 1979 prescribed maximum rate was *not* stayed or set aside upon judicial review, and is no longer subject to any further judicial scrutiny (*see* 28 U.S.C. §2344). Therefore, it is final and has the force of a statute for purposes of the *Arizona Grocery* rule against reparations.

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[24] It might be argued that this case does not present an *Arizona Grocery* situation for two reasons: (1) the Commission's 1979 decision did not have the force of law because it had been vacated in the 1980 decision, and (2) the 1979 decision had been reversed in the same docket, not in a subsequent proceeding. However, these differences in procedures were also present in *Industrial Sand Cases, 1930,* 204 I.C.C. 159, 180 (1934), where the Commission *did* apply *Arizona Grocery* to prohibit the assessment of reparations. More important, the manner in which the Commission reverses its prior decisions is irrelevant to the question of whether its original order has prescribed a lawful rate as a maximum, which is the only question under *Arizona Grocery*.

[25] IP&L has asserted that the award of the escrow fund to IP&L was not an assessment of reparations because the funds were paid into the escrow account pursuant to a court order rather than pursuant to the tariff. *See* Reply to Railroad's Petition to Vacate (filed June 15, 1981), at 9-14. This assertion is not correct. The $7.25 rate was published in a tariff by BN in compliance with the Commission's 1979 decision and became effective on August 13, 1979. The temporary restraining order issued by the Iowa court never purported to enjoin the Commission from approving a $7.25 rate, nor did it enjoin BN from complying with the Commission's order by filing that tariff. Indeed, the state court could not have done so under Section 2349(b) of the Judicial Code (28 U.S.C. §2349(b)), without making the United States and the Commission parties, and otherwise complying with the express standards of that section. Instead, it merely prohibited BN from taking any action on its own *to collect* any rate higher than the level set forth in the "letter of understanding." The Court of Appeals recognized that this was the injunction's sole effect when it converted the temporary restraining order into an escrow fund (order dated September 24, 1979), and also when it subsequently remarked in its February 12, 1980, review of the district court's denial of IP&L's motion for a preliminary injunction that "[in] compliance with the ICC ruling [of July 1979], Burlington on August 8, 1979, published a tariff reducing the $7.38 rate to $7.25" (App. F at F-6 n.6).

In addition, in the separate Eighth Circuit proceedings that reviewed the Commission's 1979 decision, the same panel of the Court of Appeals

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this case from *Arizona Grocery* or justify the order of the Court of Appeals. The monies were paid into the fund because they were owed by IP&L to BN pursuant to BN's lawfully filed tariff—as required by the Commission's prescriptive order.

The holding of *Arizona Grocery* has repeatedly been reaffirmed by this Court,[26] and has been routinely followed by lower courts as well, including the Eighth Circuit.[27] Most recently, in *Arkansas*

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declined to stay the ICC's decision, and ultimately dismissed those proceedings without ever setting the Commission's 1979 decision aside. Thus, whatever the equitable powers of the court might have been had it decided either to stay or set aside the 1979 Commission decision, the Court of Appeals never exercised those powers in this case.

The Court of Appeals for the Eighth Circuit has itself rejected the notion that a court can award reparations from an effective tariff rate on equitable grounds. In *Chicago & N.W. Ry. Co.* v. *Union Packing Co.*, 514 F.2d 30, 32 (8th Cir. 1975), Chief Judge Lay wrote for the court:

> "Union's contention under the equitable doctrine of unjust enrichment is easily laid to rest. It is well settled that 'equitable considerations may not serve to justify [the] failure of [a] carrier to collect, or retention by [the] shipper of, any part of lawful tariff charges.' "

[26] *See, e.g., United States* v. *Corrick*, 298 U.S. 435, 439-40 (1936); *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 362-363 (1932).

[27] *See, e.g., Natural Gas Pipeline Co. of America* v. *FERC*, 590 F.2d 664, 668 (7th Cir. 1979) ["[T]he Supreme Court held [in *Arizona Grocery*] that the Interstate Commerce Commission was bound to recognize the validity of the rule of conduct prescribed by it, and that it could not repeal its own enactments with retroactive effect"]; *Cincinnati N.O. & T. Pac. Ry. Co.* v. *Chesapeake & O. Ry. Co.*, 441 F.2d 483, 488 (4th Cir. 1971); *National Labor Relations Board* v. *A.P.W. Products Co.*, 316 F.2d 899, 906 (2d Cir. 1963); *Woodrich* v. *Northern Pac. Ry. Co.*, 71 F.2d 732, 735 (8th Cir. 1934); *Winston Bros. Co. & Green Construction Co.* v. *United States*, 193 F.Supp.724, 725-27 (S.D. Iowa 1961).

The Commission has also consistently adhered to the significant limitation on its remedial powers set out in *Arizona Grocery* even where it has vacated its earlier rate determinations, or is acting in the same agency proceeding. *See, e.g., Industrial Sand Cases, supra*, where the

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Louisiana, this Court rejected the proposition that courts could in effect impose a rate different from a tariff approved by FERC (101 S.Ct. at 2930):

> "Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively."

Given this Court's express holding that courts lack the power to grant reparations based on contract claims under the National Gas Act (which requires that contracts be filed with FERC by carriers subject to its jurisdiction), *a fortiori*, courts cannot grant reparations from a tariff rate that has been prescribed by the Interstate Commerce Commission as a maximum.

For these reasons, the award of reparations by the Court of Appeals is plainly inconsistent with the holdings of *Arizona Grocery* and its progeny. This Court should review this case to correct the mistake of law made by the Court of Appeals, and to prevent such errors in the future.[28]

(Footnote continued from previous page)
Commission *expressly* held that *Arizona Grocery* precludes retroactive adjustments even though the agency was—in that same proceeding—vacating its earlier rate approval.

[28] The extent of the *Commission's* power to award reparations, after it had prescribed a maximum reasonable rate but later prescribed a lower rate in the same proceeding, is also at issue in a case now pending before the United States Court of Appeals for the District of Columbia Circuit (No. 79-1547, *Burlington Northern Inc.*. v. *United States*).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

R. EDEN MARTIN
RICHARD E. YOUNG
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 624-1412

HOWARD J. TRIENENS
THEODORE N. MILLER
RICHARD J. METZGER
One First National Plaza
Chicago, Illinois 60603
Attorneys for Petitioner

CURTIS H. BERG
ALAN R. POST
176 E. Fifth St.
St. Paul, Minnesota 55101

Of Counsel

October 19, 1981

STATUTORY APPENDIX

The Congressional Declaration of Findings accompanying the Staggers Rail Act of 1980, Pub. L. No. 96-448, Section 2, provides as follows:

"The Congress hereby finds that—

"(1) historically, railroads were the essential factor in the national transportation system;

"(2) the enactment of the Interstate Commerce Act was essential to prevent an abuse of monopoly power by railroads and to establish and maintain a national railroad network;

"(3) today, most transportation within the United States is competitive;

"(4) many of the Government regulations affecting railroads have become unnecessary and inefficient;

"(5) nearly two-thirds of the Nation's intercity freight is transported by modes of transportation other than railroads;

"(6) earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements;

"(7) by 1985, there will be a capital shortfall within the railroad industry of between $16,000,000,000 and $20,000,000,000;

"(8) failure to achieve increased earnings within the railroad industry will result in either further deterioration of the rail system or the necessity for additional Federal subsidy; and

"(9) modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential in order to achieve maximum utilization of railroads to save energy and combat inflation."

The Statement of Purpose and Goals accompanying the Act, Pub. L. No. 96-448, Section 3, provides as follows:

> "The purpose of this Act is to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States. In order to achieve this purpose, it is hereby declared that the goals of this Act are—
>
> > "(1) to assist the railroads of the Nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense;
> >
> > "(2) to reform Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system;
> >
> > "(3) to assist the rail system to remain viable in the private sector of the economy;
> >
> > "(4) to provide a regulatory process that balances the needs of carriers, shippers, and the public; and
> >
> > "(5) to assist in the rehabilitation and financing of the rail system."

Section 101(a) of the Staggers Rail Act of 1980, 84 Stat. 1897, codified at 49 U.S.C. §10101(a), provides as follows:

> "In regulating the railroad industry, it is the policy of the United States Government—
>
> * * *
>
> "(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;
>
> "(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
>
> "(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes."

Section 201(a) of the Staggers Act, 94 Stat. 1898, codified at 49 U.S.C. §10701(a), provides as follows:

> "(a) Except as provided in subsection (b) or (c) of this section and unless a rate is prohibited by a provision of this title, a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may establish any rate of transportation or other service provided by the carrier.
>
> "(b)(1) If the Commission determines, under section 10709 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable."
>
> * * *
>
> "(3) In determining whether a rate established by a rail carrier is reasonable for purposes of this section, the Commission shall recognize the policy of this title that carriers shall earn adequate revenues, as established by the Commission under section 10704(a)(2) of this title."

Section 202 of the Staggers Act, 94 Stat. 1900, amends 49 U.S.C. §10709 to read as follows:

> "(a) In this section, 'market dominance' means an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies.
>
> "(b) When a rate for transportation by a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is challenged as being unreasonably high, the Commission shall determine, within 90 days after the start of a proceeding under section 10707 of this title to investigate the lawfulness of that rate, whether the carrier proposing the rate has market dominance over the transportation to which the rate applies. The Commission may make that determination on its own initiative or on complaint. A

finding by the Commission that the carrier does not have market dominance is determinative in a proceeding under this subtitle related to that rate or transportation unless changed or set aside by the Commission or set aside by a court of competent jurisdiction.

"(c) When the Commission finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. However, a finding of market dominance does not establish a presumption that the proposed rate exceeds a reasonable maximum. This subsection does not limit the power of the Commission to suspend a rate under section 10707(c) of this title. However, if the Commission has found that a carrier does not have market dominance over the transportation to which the rate applies, the Commission may suspend an increase in that rate as being in excess of a reasonable maximum for that transportation only if it specifically changes or sets aside its prior determination of market dominance.

"(d)(1) In this subsection—

"(A) 'fixed and variable cost' means all cost incurred by rail carriers in the transportation of freight, but limiting the return on equity capital to a rate equal to the embedded cost of debt.

"(B)(i) 'cost recovery percentage' means the lowest revenue variable cost percentage which, if all movements that produced revenues resulting in revenue-variable cost percentages in excess of the cost recovery percentage are deemed to have produced only revenues resulting in the cost recovery percentage, would produce revenues which would be equal, when combined with total revenues produced by all other traffic transported by rail carrier, to the total fixed and variable cost of the transportation of all traffic by rail carrier.

(ii) for purposes of determining the cost recovery percentage only, 'revenue-variable cost percentage' means the quotient, expressed as a percentage figure, obtained by dividing the total revenues produced by the transportation of all traffic received by rail carriers for rail transportation by the total variable cost of such transportation.

"(2) In making a determination under this section, the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage of such transportation that is less than—

(A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and ending September 30, 1981;

(B) 165 percent during the period beginning October 1, 1981, and ending September 30, 1982;

(C) 170 percent during the period beginning October 1, 1982, and ending September 30, 1983;

(D) 175 percent or the cost recovery percentage, whichever is less, during the period beginning October 1, 1983, and ending September 30, 1984; and

(E) the cost recovery percentage, during each 12-month period beginning on or after October 1, 1984."

Section 208(a) of the Staggers Act, 94 Stat. 1908, codified at 49 U.S.C. §10713, provides as follows:

"(a) One or more rail carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions. Such a rail carrier may not enter into a contract with purchasers of rail service except as provided in this section.

> "(b) Each contract entered into under this section shall be filed with the Commission, together with a summary of the contract containing such nonconfidential information as the Commission prescribes. The Commission shall publish special tariff rules for such contracts in order to assure that the essential terms of the contract are available to the general public in tariff format.
>
> "(c) A contract filed under this section shall be approved by the Commission, as provided in subsection (e) of this section, unless the Commission determines in a proceeding under subsection (d) of this section that such contract is in violation of this section.
>
> * * *
>
> "(i)(1) A contract that is approved by the Commission under this section, and transportation under such contract, shall not be subject to this subtitle, and may not be subsequently challenged before the Commission or in any court on the grounds that such contract violates a provision of this subtitle.
>
> "(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree."

Section 710(a) of the Staggers Rail Act of 1980, 94 Stat. 1966, provides as follows:

> "Except as provided in [Sections 206, 218(b), and 701], the provisions of this Act and the amendments made by this Act shall take effect on October 1, 1980."

APPENDIX A

IOWA POWER AND LIGHT COMPANY,
a Corporation, Appellant,

v.

BURLINGTON NORTHERN, INC., a
Corporation, Appellee.

IOWA POWER AND LIGHT
COMPANY, Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and United States of
America, Respondents,

and

Burlington Northern, Inc.,
Intervenor-Respondent (two cases).

BURLINGTON NORTHERN
INC., Petitioner,

v.

UNITED STATES of America and
Interstate Commerce Commission,
Respondents,

Iowa Power and Light Company,
Intervenor-Respondent.

Nos. 79-1676, 80-1914, 80-1915
and 80-1959.

United States Court of Appeals,
Eighth Circuit.

April 27, 1981.

Curtis H. Berg, Alan R. Post, St. Paul, Minn., Howard J. Trienens, Richard J. Metzger, Chicago, Ill., Albert E. Schoenbeck, St. Louis, Mo., R. Eden Martin, Richard E. Young, Washington, D.C., for Railroad petitioner.

Lynn K. Vorbrich, Curtis L. Ritland, Iowa Power and Light Co., Des Moines, Iowa, John M. Cleary, Frederic L. Wood, Nicholas J. DiMichael, Donelan, Cleary, Wood & Maser, P. C., Washington, D. C., William E. Franke, Clayton, Mo., for Iowa Power and Light.

Sanford M. Litvack, Asst. Atty. Gen., John J. Powers, III, Kenneth P. Kolson, Attys., Dept. of Justice, Washington, D.C., Richard A. Allen, Kathleen M. Dollar, Deputy Associate General Counsel, Evelyn G. Kitay, Atty., Interstate Commerce Commission, Washington, D.C. for ICC and United States.

Thomas L. Croft, St. Louis, Mo., W. Don Brittin, Jr., Randall G. Horstmann, Des Moines, Iowa, Louis A. Harris, St. Paul, Minn., for Burlington Northern; Coburn, Croft & Putzell, St. Louis, Mo., Nyemaster, Goode, McLaughlin, Emery & O'Brien, Des Moines, Iowa, of counsel.

John M. Cleary, Frederic L. Wood, Nicholas J. DiMichael, Donelan, Cleary, Wood & Maser, Washington, D.C., William E. Franke, Clayton, Mo., Lynn K. Vorbrich, Curtis L. Ritland, Iowa Power & Light Co., Des Moines, Iowa, John A. McClintock, David L. Brown, Hansen, McClintock & Riley, Des Moines, Iowa, for Iowa Power & Light Co.

Before LAY, Chief Judge, and ROSS and HENLEY, Circuit Judges.

HENLEY, Circuit Judge:

Burlington Northern, Inc. (Burlington Northern or BN) brings this petition to review orders[1] of the Interstate Commerce Com-

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[1] This petition for review encompasses I & S 9199, *Unit Train Rates on Coal—Burlington Northern, Inc.*, 364 ICC 186 (1980); No. 36944,

(Footnote continued on following page)

mission (ICC or Commission) which prescribe a maximum reasonable rate for the transportation of coal from Belle Ayr, Wyoming to Council Bluffs, Iowa. In the decision which is the focus of this appeal, I & S 9199, *Unit Train Rates on Coal—Burlington Northern, Inc.*, 364 ICC 186 (1980), the Commission prescribed a transportation rate which holds Burlington Northern to a rate negotiated in 1973 with the Iowa Power and Light Company (Iowa Power or IPL). In this decision, served on October 1, 1980 (the "October 1 decision"), the Commission reversed an earlier ruling which refused to give weight to the parties' agreement. I & S 9199, *Unit Train Rates on Coal—Burlington Northern Inc.*, 361 ICC 655 (1979).

For the reasons stated below, we deny the petition for review.

I. BACKGROUND

The Iowa Power and Light Company is engaged in the sale and generation of electricity in the State of Iowa. The utility maintains a coal-fired generating plant at Council Bluffs, Iowa, which is supplied under a twenty-year supply contract with coal from Belle Ayr, Wyoming.

IPL announced its plans to construct the generating plant at Council Bluffs in 1972, and began at that time to negotiate for coal supply and transportation. In 1973 the utility and the Amax Coal Company joined in a statement of intent under which Iowa Power would purchase thirty-five million tons of coal from Amax over the term of the arrangement. IPL then commenced negotiating with Burlington Northern, the only rail line serving the Amax mine at Belle Ayr, Wyoming.

On July 10, 1973 BN quoted a unit train rate of $3.21 per net ton in shipper-owned cars, which was accepted by Iowa Power on

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Iowa Power and Light Co. v. Burlington Northern, Inc.; No. 37322, *Coal Belle Ayr and Eagle Junction, Wy. to Council Bluffs, Ia.;* No. 37354, *Iowa Power and Light Co. v. Burlington Northern, Inc.*

July 25, 1973. From this date until early 1976 the railroad and the utility had several meetings concerning the contemplated movement, but neither side questioned the level of the $3.21 rate. Negotiations continued, however, because no agreement had been reached on how the rate would be adjusted in the future as costs increased. Meanwhile, IPL in November, 1973 entered into a contract with Amax Coal Company for the supply of coal. Finally, on January 7, 1976, BN sent to IPL a letter of understanding, incorporating the parties' consensus regarding the base rate for coal transportation and a rate escalation formula. IPL signed the letter on February 16, 1976.

In 1977 IPL gave notice to BN that coal movements would commence on January 1, 1978. As this date approached, however, Burlington Northern in December, 1977 advised IPL that it would not publish the agreed rate[2] of $5.23 because several recent coal rate adjustments approved by the Commission made it appear that this rate was beneath the going pattern of rates. Burlington Northern offered to publish a rate of $6.32 and to hold this rate until July 1, 1979. Iowa Power in turn insisted that BN honor the agreed rate.

This impasse was followed by Burlington Northern's unsuccessful attempt, not directly relevant here, to publish a capital incentive rate of $7.38. The Commission found that the proposed rate did not qualify for capital incentive treatment, *Incentive Rate on Coal—Belle Ayr, Wyoming to Council Bluffs, Iowa,* 359 ICC 201 (1978), and the parties were once again left to negotiate their differences.[3]

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[2] For convenience, we refer hereinafter to the "contract rate" or "agreed rate," recognizing that the effective rate under the parties' agreement continues to rise in accordance with an escalation formula which is part of the agreement.

[3] To allow shipments of coal to commence to move, Burlington Northern published the agreed rate of $5.23 on an interim basis. Pursuant to

(Footnote continued on following page)

Ultimately BN elected to file the same $7.38 rate under normal statutory notice provisions. This increase is the subject to the present petition for review.

The proposed $7.38 rate was kept from becoming effective pending investigation by Iowa Power's filing of a petition for suspension and investigation (I & S Docket No. 9199) and a complaint (Docket No. 36944) under the provisions of 49 U.S.C. § 10707.[4] Pending investigation Burlington Northern was allowed to establish a rate no higher than $5.62, that is, the contract rate as increased by the parties' agreed cost escalation formula.

In decisions dated July 6 and July 13, 1979 the ICC concluded that BN's $7.38 rate was unlawfully high. Docket No. I & S 9199, *Unit Train Rates on Coal—Burlington Northern, Inc.*, 361 ICC 655 (1979). Significantly, the Commission declined to hold BN to the parties' agreed rate, prescribing instead as a reasonable maximum rate the above-contract rate of $7.25 per net ton.

Petitions for judicial review followed,[5] with eventual consolidation of the appeals in this court. While these petitions were pending, however, the Commission sought and the court on May 7, 1980 granted a remand to the Commission, giving the ICC an op-

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Freight Tariff 280, ICC No. 496 (subsequently renumbered ICC BN 4184), the $5.23 rate became effective February 1, 1978, and carried a cancellation date of June 30, 1978, which was the contemplated effective date of the capital incentive rate.

[4] Section 10707 is derived from Section 15(8) of the Interstate Commerce Act, 49 U.S.C. § 15(8) (1976), as amended by the Local Rail Service Assistance Act of 1978, Pub.L.No. 95-607, Title VI, § 401, 92 Stat. 3067. The section was recodified pursuant to the Revised Interstate Commerce Act, Pub.L.No. 95-473, 92 Stat. 1380 (1978). For convenience we refer to the section as contained in the West Annotation (Supp.1980).

[5] IPL petitioned for review of the July 6, 1979 decision in the Eighth Circuit. BN petitioned for review of the July 6 and July 13, 1979 decisions in the United States Court of Appeals for the D. C. Circuit. The D. C. Circuit transferred those appeals to this court on August 30, 1979.

portunity to reexamine its findings in light of its policy on negotiated ratemaking.

The order which is the focus of the present review is the product of this remand. The Commission by order served on October 1, 1980 found that it had erred in July, 1979 in prescribing $7.25 as a maximum reasonable rate without giving weight to the parties' agreement. The Commission found instead that the agreed rate was a just and reasonable maximum. I & S 9199, *supra*, 364 ICC at 200.

Both parties petitioned for review of the ICC's October 1, 1980 decision.[6] The United States and Interstate Commerce Commission are respondents pursuant to 28 U.S.C. § 2322 and Fed.R.App.P. 15(a). This court has jurisdiction under 28 U.S.C. §§ 2321(a), 2342(5) as amended by Pub.L.No. 93-584, 88 Stat. 1917 (1975), and 2344.

On review, objections are raised to (A) the Commission's jurisdiction under the Staggers Rail Act of 1980; (B) the enforcement of a private agreement as outside of the ICC's authority and contrary to decisional precedent; (C) the Commission's finding that the parties intended to be bound; (D) the violation of statutory ratemaking guidelines; and (E) the Commission's promulgation of a new policy on contract rates without notice and comment.

II. DISCUSSION

A. Jurisdiction under the Staggers Rail Act of 1980[7]

BN raises a jurisdictional issue of first impression: whether the Staggers Rail Act of 1980, Pub.L.No. 96-448, 94 Stat. 1895

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[6] Iowa Power subsequently moved for and was granted permission to withdraw its petition for review.

[7] Ordinarily, we would be compelled to remand this proceeding to the ICC, deferring to the agency for a decision in the first instance on the jurisdictional question. However, as a statutory part to this review, the

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(1980) (the Staggers Rail Act or the Act) deprived the Commission of jurisdiction to compel a rate reduction in its decision of October 1, 1980.[8]

Burlington Northern argues that the ICC lacked jurisdiction to enter its October 1, 1980 order,[9] relying on the following provision of Section 202 of the Staggers Rail Act:

> [T]he Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than—
>
> (A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and ending September 30, 1981.

Pub.L.No. 96-448, 94 Stat. 1900 (1980), to be codified at 49 U.S.C. § 10709(d).

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Commission has had an opportunity to present its position on the Staggers Rail Act. Relying on Section 208 of the Act, the Commission contends that the jurisdictional threshold of Section 202 does not apply. Therefore, the Commission concludes, the ICC had jurisdiction to issue its October 1, 1980 decision. We reach the same result by a different route. *Cf. FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 647, 92 S.Ct. 1827, 1841, 32 L.Ed.2d 369 (1972) (Court of Appeals is obliged to defer to agency for determination of primary jurisdiction when the issue is pending in proceeding before the agency); *Marine Engineers Beneficial Ass'n v. Interlake Steamship Co.*, 370 U.S. 173, 185, 82 S.Ct. 1237, 1243, 8 L.Ed.2d 418 (1962) (need for protecting agency's exclusive jurisdiction is greatest when issue before the court is in the process of litigation through procedures originating in the agency.)

[8] The Staggers Rail Act of 1980 was signed into law on October 14, 1980. Section 710 of the Act provides that all provisions relevant here became effective as of October 1, 1980. Pub. L.No. 96-448, 94 Stat. 1966 (1980).

[9] The argument that the Commission lacked jurisdiction would seem to apply as well to the Commission's orders of July, 1979. All of these orders were entered on or before the effective date of the Staggers Rail

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This provision relating to market dominance is best comprehended against the background of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L.No. 94-210, 90 Stat. 31 (1976) (the 4-R Act). In the 4-R Act, Congress set forth market dominance as a novel test for the Commission's jurisdiction over a challenged rate. Section 202 of the 4-R Act, recodified as part of the Revised Interstate Commerce Act, Pub.L.No. 95-473, 92 Stat. 1382 (1978), 49 U.S.C. § 10709(b), provides that the Commission has no jurisdiction over a rate in circumstances where the rail carrier lacks market dominance. Regulation of rates in such competitive circumstances is left to market forces.

The Staggers Rail Act continues the deregulation of rail traffic begun by the 4-R Act, providing in Section 202 a presumption *against* market dominance where the rail carrier's revenues from the transportation at issue do not exceed variable costs by at least 160 percent.

Burlington Northern contends that the agreement rate ordered by the Commission in its October 1, 1980 decision will provide revenues that are 123 percent of variable costs plus additives.[10] This 123 percent figure is far below the 160 percent ratio needed

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Act. Thus, the same jurisdictional question pertains to each order, namely whether the Staggers Rail Act necessitates a retroactive determination of ICC jurisdiction in the context of a final Commission decision.

[10] The Commission found that restated variable costs plus additives at the revenue need level were $4.58 per ton. 364 ICC at 210 1.24b. The agreement rate ordered by the Commission is $5.62 per ton. BN calculates the revenue-to-cost percentage by dividing $5.62 by $4.58, *i. e.*, $5.62 ÷ $4.58 = 1.227.

Because we find that the revenue-to-cost percentage specified in the Staggers Rail Act does not apply in this case to determine jurisdiction, it is unnecessary to decide whether additives should be included in the calculation of the revenue-to-variable-cost ratio. *See Central Power and Light Co. v. United States*, 634 F.2d 137 (5th Cir. 1980), *petition for*

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to trigger the ICC's jurisdiction under the Staggers Rail Act. Accordingly, Burlington Northern argues, the Commission had no jurisdiction to issue its October 1 decision or to order the agreement rate of $5.62 as a reasonable maximum.

While Burlington Northern argues that Section 202 controls, the ICC contends that another section of the Staggers Rail Act, Section 208, governs the jurisdictional issue. Section 208 addresses negotiated ratemaking and authorizes rail carriers to enter into privately negotiated contracts for rail services. In subsection (j), which is directly relevant here, Congress addressed the status of contracts already in effect as of the effective date of the Staggers Rail Act, as follows:

> The provisions of this section shall not affect the status of any lawful contract between a rail carrier and one or more purchasers of rail service that is in effect on the effective date of the Staggers Rail Act of 1980. Any such contract shall hereafter have the same force and effect as if it had been entered into in accordance with the provisions of this section. Nothing in this section shall affect the rights of the parties to challenge the existence of such a contract.

Pub.L.No. 96-448, 94 Stat. 1909-10 (1980) to be codified at 49 U.S.C. § 10713(j).

The Commission contends that this subsection preserves the contract rights of parties, such as Iowa Power, who negotiated rate agreements prior to enactment of the Staggers Rail Act. The Commission argues, in other words, that Section 208 takes precedence over Section 202. Allegedly, Section 208 creates a limited category of pre-Staggers Rail Act rate agreements over which the Commission has continuing jurisdiction regardless of the jurisdictional threshold set forth in Section 202.

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rehearing granted Feb. 26, 1981. *See also* the Staggers Rail Act, § 202, to be codified at 49 U.S.C. § 10709(d)(1)(A) (providing that for purposes of market dominance, the return on equity capital is limited to a rate equal to the embedded cost of debt).

We believe that the parties' respective reliance on Sections 202 and 208 is misplaced. Both BN and the ICC assume that the Staggers Rail Act applies here, although with disagreement as to which section of the Act determines the ICC's jurisdiction. We conclude to the contrary that the Staggers Rail Act is not applicable.[11]

We base our conclusion on three grounds: (i) the Staggers Rail Act does not alter the provision of 49 U.S.C. § 10709(b) requiring a ninety-day determination of market dominance; (ii) the legislative history of the Staggers Rail Act directs that case law should determine the effect of the Act on pending cases; and (iii) case law teaches that new legislation should not be applied to pending cases where manifest injustice would result.

(i) The Ninety Day Provision of 49 U.S.C. § 10709(b)

We begin our analysis from the premise that the new provisions of the Staggers Rail Act pertaining to market dominance must be integrated with existing statutory provisions, particularly those of the 4-R Act. We view as crucial the relationship between 49 U.S.C. § 10709*(b)* and the new provisions of Section 202 of the Staggers Rail Act, 49 U.S.C. § 10709*(d)*.

The 4-R Act directed the Commission to render a determination on market dominance "within 90 days after the start of a proceeding under section 10707." 49 U.S.C. § 10709(b). The new presumption against market dominance provided by the Staggers

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[11] Given this conclusion, we do not reach the questions (1) whether Section 208 of the Staggers Rail Act should be read as a jurisdictional provision; (2) whether Section 208 creates a "contract" exception to the jurisdictional thresholds of Section 202; (3) whether contract rights preserved by subsection (j) of Section 208 are enforceable by the Commission or the courts.

These are difficult issues, answered only in part by pertinent legislative history. *See* 120 Cong.Rec. H8606 (daily ed. Sept. 9, 1980) (remarks of Rep. Dingell); 126 Cong.Rec. H10085-86 (daily ed. Sept. 30, 1980) (remarks of Rep. Dingell). *See also ICC Interpretive Statement—Contract Rates*, decided November 5, 1980 (unpublished).

Rail Act in 49 U.S.C. § 10709(d) is presumably intended to operate within the established ninety day period. *Cf. Burlington Northern, Inc. v. United States,* 555 F.2d 637, 640 (8th Cir. 1977) (ninety day language of 49 U.S.C. § 10709(b) was determinative of the time at which new market dominance standards promulgated by the Commission would apply). In effect, therefore, the Act's 160 percent jurisdictional threshold will apply (1) in proceedings begun *on* or *after* effective date of the Act, in which the ninety day period for a market dominance determination has not begun to run, and (2) in those few proceedings begun *before* the effective date of the Act in which the ninety day period for a jurisdictional determination still pends. This is not such a case.

Here, a finding of market dominance was entered by the Commission's Suspension and Fourth Section Board in 1978 and was affirmed by the full Commission in its July 13, 1979 decision, well before the effective date of the Staggers Rail Act. I & S 9199, *supra*, 361 ICC at 671, 687. The Commission reaffirmed its finding of market dominance in its October 1, 1980 decision. I & S 9199, *supra*, 364 ICC at 201, App. A. To require a reassessment of market dominance at this late date would contravene the express statutory dictate that market dominance be determined within 90 days of the start of a proceeding. We find no indication that Congress, by setting a jurisdictional threshold in the Staggers Rail Act, intended to alter the ninety day rule.

(ii) Legislative History

The legislative history of the Staggers Rail Act further supports a prospective application of the legislation. The House Conference Report indicates that case law should control the effect of the Act on existing cases. House Conf.Rep.No.96-1430, 96th Cong., 2d Sess. at 142 (1980), *reprinted in* [1980] U.S.Code Cong. & Ad. News, 7378, 7510, 7574.[12] Although decision law is

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[12] The Senate Bill, S. 1946, 96th Cong., 2d Sess. (1980), contained no provision for the effect of the Staggers Rail Act on pending matters.

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not free from ambiguity, we conclude that prospective application is suggested by case precedent.

(iii) Case Law

We acknowledge that case law looks both ways. In favor of retroactive application of the Staggers Rail Act is the principle that a court must apply the law in effect at the time of its decision.[13]

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House Conf.Rep.No.96-1430, 96th Cong., 2d Sess. at 142 (1980), *reprinted in* [1980] U.S. Code Cong. & Ad.News at 7574.

The House Bill, H.R.No.7235, 96th Cong., 2d Sess. (1980), contained a provision stating that all applications or proceedings pending before the Commission or other agencies, or any court, should be determined as if the law had not been enacted. House Conf.Rep.No.96-1430, 96th Cong., 2d Sess. at 142; *reprinted in* [1980] U.S.Code Cong. & Ad.News at 7574.

The House and Senate Conference Committee deleted the House provision and substituted Section 706 of the Staggers Rail Act, which addresses the effect of the Act on *existing rate bureau proceedings*. The final version of the Act does not address other pending proceedings, but this omission "is not intended to create any implication" that pending proceedings are not to be *adjudicated or determined under existing law or the new legislation in accordance with controlling case law*. The deletion of these provisions means that existing cases at the Commission, other affected agencies, or pending in the Federal courts, *shall be determined as present case law requires that they be determined*. House Conf.Rep.No.96-1430, 96th Cong., 2d Sess. at 142; [1980] U.S. Code Cong. & Ad.News at 7574 (emphasis added).

Since the present proceeding is not a rate bureau proceeding, the legislative history of the Staggers Rail Act clearly refers us to case law in determining the effect of the legislation on pending cases.

[13] This principle conflicts with the rule of statutory interpretation favoring prospective application of new law. The conflict between these principles has not often been acknowledged, let alone resolved, *Hill v. United States*, 571 F.2d 1098, 1102 (9th Cir. 1978); *Bradley v. School Board of Richmond*, 472 F.2d 318, 335 (4th Cir. 1972) (en banc) (Winter, J., dissenting), *vacated*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), although a helpful discussion is contained in *Sikora v. American Can Co.*, 622 F.2d 1116, 1125-35 (3d Cir. 1980) (Adams, J., dissenting).

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Bradley v. School Board of Richmond, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969); *Bruner v. United States*, 343 U.S. 112, 72 S.Ct. 581, 96 L.Ed. 786 (1952); *Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L.Ed. 540 (1866); *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801). On the other hand, exception to this principle has been recognized where application of the intervening law would result in manifest injustice. *Bradley v. School Board of Richmond, supra*, 416 U.S. at 716, 94 S.Ct. at 2018; *Thorpe v. Housing Authority of Durham, supra*, at 282, 89 S.Ct. at 526; *Greene v. United States*, 376 U.S. 149, 160, 84 S.Ct. 615, 621, 11 L.Ed.2d 576 (1964); *Arkoosh v. Dean Witter & Co.*, 571 F.2d 437 (8th Cir. 1978) (per curiam). We conclude that the manifest injustice exception as explicated by the Supreme Court in *Bradley v. School Board of Richmond, supra*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476, pertains here.

The *Bradley* opinion identifies three factors which are pertinent to the exception: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717, 94 S.Ct. at 2019.

In discussing the first factor, the Supreme Court has distinguished litigation involving "great national concerns," and parties who are public entities, from private cases between individuals. *Id.* at 718–19, 94 S.Ct. at 2019–20, *citing Schooner Peggy, supra*, 1 Cranch at 110. Where only private entities are involved, as here, the courts are admonished to "struggle hard against a construction which will, by a retrospective operation,

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We find it unnecessary to resolve the conflict between the two lines of decision because we reach the same result under the concept of presumed prospectivity and under the "manifest injustice" exception to the rule applying new law to pending cases.

affect the rights of parties." *Id.* at 717, 94 S.Ct. at 2019, *citing Schooner Peggy, supra,* 1 Cranch at 110.

Admittedly, Congress in the Staggers Rail Act addressed matters of national concern, namely the deterioration of the nation's rail system and the need to preserve a financially stable system in the private sector of the economy. House Conf.Rep. 96-1430, 96th Cong., 2d Sess. at 79-80 (1980), *reprinted in* [1980] U.S. Code Cong. & Ad. News at 7510-11. These national concerns encourage, to some extent, retroactive application of the legislation.

However, the national objective of revenue adequacy for the nation's railroads can be achieved in the present instance without impairment of the parties' rights through retroactive application of the new law. The agreed rate will fully compensate BN at the revenue need level. *See* Section D, *infra.* Under *Bradley*, the rights of the parties should not be disturbed by retroactive application of the Staggers Rail Act where the national concerns of the legislation will be met without such retroactivity.

The second factor cited in *Bradley* provides further argument against retroactive application of the Staggers Rail Act. Concerning the "nature of the rights affected," the *Bradley* court noted that it would refuse to apply an intervening change in law to a pending action where to do so would infringe upon a right that had matured or become unconditional. *Id.* at 720, 94 S.Ct. at 2020, *citing Greene v. United States, supra,* 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed.2d 576; *Claridge Apartments Co. v. Commissioner,* 323 U.S. 141, 65 S.Ct. 172, 89 L.Ed. 139 (1944); *Union Pacific R.R. v. Laramie Stock Yards Co.,* 231 U.S. 190, 34 S.Ct. 101, 58 L.Ed. 179 (1913).

Here, Iowa Power's right to contest the Council Bluffs rate in ICC proceedings matured with the Commission's finding of market dominance. The utility's right to ship coal at the agreed rate matured under the Commission's October 1, 1980 decision, on the effective date of the Staggers Rail Act.[14] *Compare Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1180 n.6 (2d Cir. 1977) (injustice resulting from retroactive application of new law depends upon the stage to which litigation has progressed).

Finally, the *Bradley* court indicated that manifest injustice would be measured by the nature of the impact of the new law on existing rights. Stated another way, the Court thought that manifest injustice would stem from the imposition of new and unanticipated obligations on a party without notice or an opportunity to be heard. *Id.* at 720, 94 S.Ct. at 2020. Here, insofar as application of the Staggers Rail Act might operate[15] to deprive the Com-

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[14] We recognize the difficulty in defining a "matured" or "vested" right for purposes of the manifest injustice exception. The argument can be made that rights become sufficiently vested to invoke the exception when there exists a final administrative decision, even though, as here, the administrative decision may become the subject of subsequent judicial appeals. *Cf. Greene v. United States, supra*, 376 U.S. at 160-61, 84 S.Ct. at 621-622 (by virtue of district court order, petitioner obtained a final and favorable determination).

On the other hand, there is considerable authority for the proposition that an appeal is not a new suit but a proceeding in the original cause, and, as such, a bar to the investiture of rights. *Rodulfa v. United States*, 461 F.2d 1240, 1252-53 & 1253 nn.64-70 (D.C.Cir.), *cert. denied*, 409 U.S. 949, 93 S.Ct. 270, 34 L.Ed.2d 220 (1972) (and citations therein). *Cf. South East Chicago Comm'n v. Dept. of Housing and Urban Development*, 488 F.2d 1119, 1125 n.6 (7th Cir. 1973) (first and basic question is what can be regarded as prospective and what must fairly be regarded as vested), *citing Jones v. Lynn*, 477 F.2d 885, 889 (1st Cir. 1973).

In the present case, we do not decide that the manifest injustice exception applies solely on the basis of existing antecedent rights, although we conclude that Iowa Power's rights under the Commission's October 1, 1980 decision are sufficient to invoke the exception. In the context of the exception, the Supreme Court has spoken not merely of infringement upon definitive rights, but also of lesser "impositions[s]." *Thorpe v. Housing Authority of Durham, supra*, 393 U.S. at 283, 89 S.Ct. at 526 (new law applies to pending proceedings where there is no infringement of existing rights and no lesser imposition).

[15] There is room for uncertainty as to whether the Council Bluffs rate falls below or above the jurisdictional threshold of a revenue-to-varia-

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mission of jurisdiction, Iowa Power could be forced to begin litigating its contract anew before the courts.[16] Such an exercise would vastly increase the burden on Iowa Power in the context of a case that began more than two and one-half years ago and that has already seen one judicial remand to the Commission. Litigation before the ICC, which had progressed to a final decision on the effective date of the Staggers Rail Act, would be rendered futile.

Given these considerations, this is clearly an instance in which the manifest injustice exception precludes application of the Act. *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra,* 567 F.2d 1174; *Monell v. Department of Social Services,* 532 F.2d 259 (2d Cir. 1976), *rev'd on other grounds,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Coe v. Secretary of Health, Education & Welfare,* 502 F.2d 1337 (4th Cir. 1974); *cf. Flanigan v. Burlington Northern, Inc.,* 632 F.2d 880 (8th Cir. 1980), *cert. denied,* U.S. , 101 S.Ct. 1370, 67 L.Ed.2d 349 (1981).

B. The Legality and Enforceability of Private Contracts

Given ICC jurisdiction over the Council Bluffs rate, BN argues in the alternative that the Commission erred under pre-Staggers Act decisional law in prescribing the agreed rate as a reasonable maximum.

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ble-cost ratio of 160 percent. The rate sought by BN ($7.38 per net ton) would result in a ratio of 162 percent. The rate ordered by the Commission in July, 1979 decisions ($7.25 per net ton) would result in a ratio of 159 percent, while the agreed rate ($5.62 per net ton) would result in a ratio of 123 percent.

[16] We intend no finding on the issue of the appropriate forum for enforcement of contracts entered into prior to the effective date of the Staggers Rail Act. The Act provides an exclusive remedy for breach of contract in the courts, but the ICC has taken the position that *pre*-Staggers Act contracts are enforceable by the Commission. *See* Staggers Rail Act of 1980, § 208, Pub.L.No. 96-448, 94 Stat. 1909 (1980), to be codified at 49 U.S.C. § 10713(i)(2); ICC Interpretive Statement—Contract Rates, served November 10, 1980 (unpublished).

BN first maintains that under the Interstate Commerce Act prior to Staggers Rail Act amendments, contract rates were unenforceable. The railroad relies principally on *American Broadcasting Companies, Inc. v. FCC*, 643 F.2d 818 (D.C.Cir. 1980), and on a line of precedent discussed at length therein. *Id.* at 822, *citing Armour Packing Co. v. United States*, 209 U.S. 56, 28 S.Ct. 428, 52 L.Ed. 681 (1908); *Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979); *Illinois Central Gulf R.R. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588 (5th Cir. 1978); *Farley Terminal Co. v. Atchison, T. & S. F. Ry.*, 522 F.2d 1095 (9th Cir.), *cert. denied*, 423 U.S. 996, 96 S.Ct. 423, 46 L.Ed.2d 370 (1975).

These decisions recognize that the ICC is charged by statute with eliminating preferential and discriminatory rates. Accordingly, the cited cases hold that parties cannot by their own secret or preferential agreement alter the enforceability of a rate that has been approved by the ICC.

This precedent is inapplicable here. The determinative feature of the cited cases is a conflict between the duly filed rate approved by the regulatory agency, and a different rate arising from a private agreement, rate representation, or equitable consideration. In such circumstances, the established tariff rate, approved by the ICC, must prevail. *Armour Packing Co. v. United States, supra,* 209 U.S. at 81–82, 28 S.Ct. at 435–36; *Farley Terminal Co. v. Atchison, T. & S. F. Ry., supra*, 522 F.2d 1095; *Chicago, B & Q. R.R. v. Ready Mixed Concrete Co.*, 487 F.2d 1263 (8th Cir. 1973).

Here, by contrast, the ratemaking authority of the regulatory agency is not threatened by attempts to enforce a rate other than the legal tariff. Rather, under the terms of the Commission's October 1, 1980 decision, the parties' contract rate and the rate approved as a reasonable maximum by the ICC through normal statutory procedures are the same.[17] *Cf. American Broadcasting Companies, Inc. v. FCC, supra*, 643 F.2d 818, at 825 (expressly declining to construe the situation before the court as one of consistency between a private contract and the effective tariff approved by the regulatory agency). A need to protect the authority of the regulatory agency against rights arising from a private agreement accordingly cannot provide the basis for nonenforcement of the parties' agreement here.

Burlington Northern further argues that contract rates were illegal per se under ICC decisional law prior to the Commission's issuance of a new policy on contract rates in 1978.[18] *Citing National Gypsum Co. v. United States*, 353 F.Supp. 941, 949

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[17] A more difficult situation was presented under the Commission's July 13, 1979 decision. I & S 9199, *supra*, 361 ICC 655. In this decision, the Commission approved $7.25 as a reasonable maximum rate, creating a situation of clear inconsistency between the Commission's approved rate and the parties' agreed rate. The July, 1979 decision was vacated by the Commission to the extent that it is inconsistent with the October 1, 1980 decision. 364 ICC at 200.

We consider separately the July, 1979 decision and an appeal involving equitable relief from this decision in Section F, *infra*.

[18] Pursuant to notice of intent to change its policy regarding contract rates, the Commission in November, 1978 issued a general policy statement expressly approving contract rates as not unlawful, and as beneficial in many situations. Ex Parte No . 358-F, *Change of Policy—Railroad Contract Rates* (served November 9, 1978); *aff'd* 361 ICC 205 (1979); *modified in* Special Permission No. 79-3700, *Railroad Contract Rates* (decided October 9, 1979).

In February, 1980 the Commission addressed the question whether the 1978 contract policy would apply to contracts executed prior to November 9, 1978. Ex Parte 358-F, *Change of Policy—Railroad Contract Rates* (decided February 21, 1980); 45 Fed.Reg. 21719 (1980). The Commission concluded that it would consider whether, or to what extent, to enforce such pre-Ex Parte 358-F contracts on a case by case basis.

For convenience, we refer hereinafter to the Commission's November 9, 1978 general policy statement as "the November, 1978 policy statement." The Commission's February 21, 1980 statement on pre-1978 contracts is referred to as "the February, 1980 statement."

(W.D.N.Y.1973); *Great Lakes Ship Owners Association v. Chicago & N. W. Ry.*, 337 ICC 287, 293 (1970); *Guaranteed Rates from Sault Ste. Marie, Ontario to Chicago*, 315 ICC 311, 323 (1961); *Contract Rates on Rugs & Carpeting from Amsterdam, N.Y. to Chicago*, 313 ICC 247 (1961), *aff'd New York Central R. R. v. United States*, 194 F.Supp. 947 (S.D.N.Y.1961), *aff'd per curiam*, 368 U.S. 349, 82 S.Ct. 391, 7 L.Ed.2d 384 (1962).

Although the legal status of private contracts was unclear prior to 1978, BN overstates the case. The language describing private agreements as "unlawful per se" was merely dictum in a plurality decision. *Guaranteed Rates from Sault Ste. Marie, Ontario to Chicago, supra*, 315 ICC at 323. As the Commission has subsequently noted, this decision "is . . . certainly not authoritative or in any way binding."[19] Ex Parte 358-F, *Change of Policy, Railroad Contract Rates (General Policy Statement)*, 361 ICC 205, 208 (1979), *citing Guaranteed Rates, supra*, 315 ICC 311. The Commission further noted that *Contract Rates on Rugs*, one of the principal cases cited for the illegality of private contracts, encouraged ratemaking innovations such as contract rates so long as such rates comport with statutory standards. *Contract Rates on Rugs & Carpeting from Amsterdam, N. Y. to Chicago, supra*, 313 ICC 247.

We conclude that the BN-IPL agreement was not illegal per se and was properly given evidentiary value in the ICC's October 1, 1980 decision.[20] *Ideal Cement Co. v. Atchison, T. & S. F. Ry. Co.*,

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[19] *Cf. United States v. Pink*, 315 U.S. 203, 216, 62 S.Ct. 552, 558, 86 L.Ed. 796 (1942) (affirmance by an equally divided court was binding on the parties but "the lack of agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases").

[20] While the Commission gave *weight* to the parties' agreement, the Commission's October 1, 1980 decision enforcing the agreed rate was not based on contract law. The Commission considered the parties'

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280 ICC 55 (1951); *Sonken-Galamba Corp. v. Chicago, B. & Q. R.R.*, 172 ICC 233, 236 (1931); *H. P. Hood & Sons v. Delaware & Hudson Co.*, 17 ICC 15, 18–19 (1909).

The Commission's approach to the parties' agreement here was particularly appropriate because it recognized the uncertain legal status of contracts entered into prior to 1978.[21] I & S 9199, *supra*, 364 ICC at 191–93, 197–98.

This is not to say that a rate agreement can control the Commission's determination of a just and reasonable rate. *Lumber from and to Hampton & Branchville R. R.*, 264 ICC 419, 425 (1946); *Shreveport Chamber of Commerce v. Gulf, C. & S. F. Ry.*, 201 ICC 73, 74 (1934); *Holley Matthews Manufacturing Co. v. Yazoo & Mississippi Valley R. R.*, 15 ICC 436, 437 (1909). However, given the fact that no secret or preferential

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agreement *and other factors* in assessing the $5.62 rate under the statutory standard of reasonableness.

We similarly do not reach issues of contract law. As to BN's contention that no contract was formed, we note without deciding that BN's 1973 rate offer was arguably made irrevocable by IPL's substantial reliance on it. *Restatement (Second) of Contracts* § 90 (Tent. Draft 1973); Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 Yale L.J. 343 (1969). Iowa Power expended over $8 million for railcars and $1.3 million for spur track improvements after a rate agreement was struck. I & S 9199, *supra*, 364 ICC at 192.

[21] Under the Commission's approach, as applied in this and other cases, contracts entered into *after* the Commission's November 9, 1978 policy statement create a presumption that an above-contract rate is unreasonable. Agreements entered into *prior* to the 1978 policy statement are considered on a case-by-case basis. Such contracts are given great weight only where, as here, the Commission is convinced (1) that the parties intended to be legally bound by the agreement; (2) that the shipper reasonably relied on the contract to its substantial detriment; (3) that public interest considerations warrant holding the carrier to the agreement. Ex Parte No. 358-F, *Change of Policy—Railroad Contract Rates* (decided February 21, 1980); 45 Fed.Reg. 21719 (1980).

BN argues as a separate point that Iowa Power has not made the first showing above, that the parties intended to be bound. We consider this contention separately. *See* Section C, *infra*.

private agreement is involved here, the Commission's consideration of the agreement as evidence bearing on a reasonable rate was not erroneous as a matter of law.[22]

C. The Parties' Intent to be Bound

Burlington Northern next argues that the Commission's enforcement of the agreed rate was erroneous because the parties had no intent to be bound by the rate negotiated in 1973. The parties' intentions present an issue of fact which we review under the substantial evidence standard. *Burlington Northern, Inc. v. United States, supra,* 555 F.2d 637.

The Commission carefully analyzed evidence of negotiations between the parties spanning the years 1973–1976. On the basis of their course of conduct, the Commission determined that both demonstrated the requisite intent to be bound. I & S 9199, *supra,* 364 ICC at 190–92. The Commission noted that BN actually sought permission to publish a rate of $5.23 (the contract rate); that Iowa Power concluded a formal contract with Amax Coal Company after agreeing to BNs proposed base rate; and that the presence of an annual escalation clause and gross inequity provision in the letter of understanding provided an orderly and agreed mechanism for resolution of unfairness. *Id.*

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[22] In concluding that the parties' agreement was properly given weight by the Commission under pre-Staggers Act decisional law, we do not decide whether subsection (j) of Section 208 of the Staggers Rail Act provides an alternate basis for enforcement of the agreed rate.

Subsection (j) of Section 208, Pub.L.No.96-448, 94 Stat. 1909 (1980), to be codified at 49 U.S.C. § 10713(j), provides that a lawful contract in effect on the effective date of the Staggers Rail Act shall have the same force and effect as if it had been entered in accordance with the provisions of Section 208. Iowa Power contended in oral argument that Congress by means of this subsection has ratified and endorsed the ICC's 1978 and 1980 policy statements approving contract rates. Subsection (j) is said by Iowa Power to "grandfather in" contracts which might have been considered illegal under pre-Staggers Act case law. We express no opinion on this contention.

Against this substantial evidence, BN merely argues that the parties could not have intended to be bound because they knew that the Commission would view contract rates as unenforceable under the authority of such cases as *Guaranteed Rates, supra,* 315 ICC 311, and *Contract Rates on Rugs, supra,* 313 ICC 247.

We are unconvinced. Under existing case law, *see* Section B, *supra,* the parties in 1973 could reasonably have concluded that a contract rate would be considered important evidence as to the reasonableness of a proposed rate. Moreover, it is difficult to imagine why the parties took such pains to negotiate and agree upon terms if they could be unilaterally changed at any time. The railroad itself first attempted to rely upon the agreement it now seeks to repudiate when, in 1977, it stated that it would publish a higher rate due to the existence of a gross inequity within the meaning of the parties' agreement. I & S 9199, *supra,* 364 ICC at 191. In sum, there is substantial evidence to support the Commission's conclusion that the parties intended to be bound.

D. Statutory Ratemaking Standards (Revenue Adequacy)

Burlington Northern next contends that Section 205 of the 4-R Act of 1976 created a new "Rule of Ratemaking" which is violated by the agreed rate.[23] Under Section 205, the Commission is statutorily obliged to establish such rates as will allow a railroad to earn a reasonable profit or return, attract and retain capital, and support capital outlays. 49 U.S.C. § 10704(a)(2).[24] Burlington Northern challenges the Commission's cost of service calculations, arguing that its own calculations show the railroad will fail to recover fully allocated costs for the Council Bluffs movement. Moreover, even if the Commission's lower cost of service calculations are accepted, BN argues that the Commission-approved rate does not satisfy the statutory requirement of "revenue adequacy" set forth in 49 U.S.C. § 10704(a)(2).

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[23] Section 205 of the 4-R Act, Pub.L.No. 94-210, 90 Stat. 41 (1976), amended Section 15a(4) of the Interstate Commerce Act, 49 U.S.C. § 15a(4) (1976). As recodified pursuant to the Revised Interstate Commerce Act, Pub.L.No. 95-473, 92 Stat. 1374 (1978), the provisions of Section 15a(4) are found at 49 U.S.C. § 10704, cited here for convenience to the West Annotation (Supp.1980).

[24] 49 U.S.C. § 10704(a)(2) provides in pertinent part:

> The Commission shall maintain standards and procedures for establishing revenue levels . . . that are adequate . . . to cover total operating expenses, including depreciation and obsolescence, plus

(Footnote continued on following page)

We turn first to the allegation that the Commission miscalculated BN's cost of service. BN specifically objects to two adjustments in the Commission's statement of costs: the removal of the return on road property included in Rail Form A, and the deduction of deferred taxes from the net investment base prior to calculating the overall cost of capital.

This court has recently considered and approved these same cost adjustments as comporting with established Commission policy and appellate court precedent. *Iowa Public Service Company v. ICC*, 643 F.2d 542, at 546–48 (8th Cir. 1981), *citing San Antonio, Texas v. United States*, 631 F.2d 831, 841–44, 846–47; Ex Parte No. 338, *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels*, 358 ICC 844, *aff'd as modified*, 359 ICC 270 (1978). Accordingly, and for the reasons set forth in the above-cited authority, we conclude that the ICC's cost restatement was not arbitrary, capricious or otherwise violative of the law.

(Footnote continued from previous page)

a reasonable and economic profit or return (or both) on capital employed in the business. The Commission shall make an adequate and continuing effort to assist those carriers in attaining revenue levels prescribed under this paragraph . . . Revenue levels established under this paragraph should—

(A) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation; and

(B) attract and retain capital in amounts adequate to provide a sound transportation system in the United States.

We turn next to the argument that the agreed rate will not satisfy the revenue adequacy requirements of 49 U.S.C. § 10704(a)(2). The $5.62 agreed rate exceeds both total variable costs plus additives at the embedded debt level ($4.56) and total variable costs plus additives at the revenue need level ($4.58). The agreed rate also slightly exceeds restated fully allocated costs plus additives at the revenue need level ($5.53). I & S 9199, *supra*, 364 ICC at 209–10. In view of the fact that the agreed rate covers fully allocated costs *at the revenue need level*, it is difficult to perceive that the rate fails to meet the revenue adequacy requirement of the statute.[25]

Burlington Northern does not allege a violation of Section 202(b) of the 4-R Act, Pub.L.No.94-210, 90 Stat. 35 (1976), as recodified in substance by the Revised Interstate Commerce Act, Pub.L.No.95-473, 92 Stat. 1371 (1978), 49 U.S.C. § 10701(b)(1), which provides that a rate is not below the reasonable minimum rate if it contributes to a railroad's going concern value. *See also* Ex Parte No. 355, *Cost Standards for Railroad Rates*, 362 ICC 799, 800 (1980). Here, the Commission found that the agreed rate contributes to BN's going concern value. I & S 9199, *supra*, 364 ICC at 193.

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[25] The Commission has interpreted "revenue adequacy" within the meaning of 49 U.S.C. § 10704(a)(2) to encompass a range of figures adequate to provide a fair rate of return on investment and a sufficient flow of funds. Ex Parte 353, *Adequacy of Railroad Revenue (1978 Determination)*, 362 ICC 198, 222–24, 246 (1980), *aff'd*, 362 ICC 794 (1980).

The Commission's restatement of costs at the revenue need level addresses this construction of revenue adequacy. Here, the ICC's restated costs at the revenue need level included provision for a rate of return (cost of capital including both debt and equity) of 10.6 percent adjusted to 9.9 percent to take into account deferred income taxes. I & S 9199, *supra*, 364 ICC at 205–06. The Commission's methodology in computing the cost of capital comports with procedures developed by ICC rulemaking. Ex Parte No. 338, *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels*, 358 ICC 844 (1978); 49 C.F.R. § 1109.25 (1978).

The Commission has also soundly reasoned that enforcement of the agreed rate will in the long run be of value in helping BN attain adequate revenue levels. I & S 9199, *supra*, 364 ICC at 194. Enforcement of the agreed rate will encourage shippers to enter long-term contracts for shipments of significant volume. Negotiated ratemaking is a pricing innovation expressly recognized by the Commission as a possible key to revenue adequacy. Ex Parte No. 353, *Adequacy of Railroad Revenue (1978 Determination)*, 362 ICC 198, 278, *aff'd*, 362 ICC 794 (1980).

E. Violation of the Administrative Procedure Act

Burlington Northern's final contention is that the Commission violated the Administrative Procedure Act (APA), 5 U.S.C. §§ 553, 706(2)(A), in promulgating and enforcing its 1980 policy statement, Ex Parte No. 358-F, *Change in Policy—Railroad Contract Rates* (decided February 21, 1980). In this statement, the ICC indicated that it would consider enforcement of contracts executed before 1978 on a case-by-case basis. *See* n.18, *supra*.

Burlington Northern argues that the 1980 policy statement was a rulemaking requiring notice and comment procedures pursuant to 5 U.S.C. § 553(b), rather than a policy statement exempt from such procedures under 5 U.S.C. § 553(b)(A). The railroad also contends that the ICC acted arbitrarily and capriciously in applying the 1980 policy to prior conduct, in violation of 5 U.S.C. § 706(2)(A).

A policy statement is not defined in the APA but has been characterized through case-by-case development.[26] Such a statement does not establish a "binding norm," but instead announces the agency's tentative intentions for the future. *Brown Express, Inc. v. United States,* 607 F.2d 695, 701 (5th Cir. 1979); *Pacific Gas & Electric Co. v. FPC,* 506 F.2d 33, 38–39 (D.C.Cir.1974), and is marked by the absence of substantial impact on existing rights and obligations. *Lewis-Mota v. Secretary of Labor,* 469 F.2d 478, 482 (2d Cir. 1972). The Attorney General's Manual further defines statements of policy as those issued "to advise the public prospectively of the manner in which the agency proposed to exercise a discretionary power." Attorney General's Manual on the Administrative Procedure Act 30 n.43 (1947). The courts have similarly required that a policy statement leave the administrator free to exercise his informed discretion. *Guardian Federal Savings & Loan Association v. Federal Savings & Loan Insurance Corp.,* 589 F.2d 658, 666 (D.C.Cir.1978). *See also* 3 B. Mezines, J. Stein & J. Gruff, Administrative Law § 15.05[4] at 15–81 (1981).

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[26] A "rule" is defined by the Administrative Procedure Act to mean in pertinent part

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates.

5 U.S.C. § 551(4).

We conclude that the ICC's 1980 policy statement satisfies these requirements. The statement advised the public prospectively how the Commission would view pre-1978 contracts in assessing the reasonableness of a rate. The statement in no way established a binding norm for future rate cases, but instead left the Commission free to exercise considerable discretion in considering whether, and to what extent, to enforce contracts executed prior to 1978. Ex Parte No. 358-F, *supra, Change of Policy—Railroad Contract Rates* (decided February 21, 1980); 45 Fed.Reg. at 21720.

We also conclude that the ICC did not act arbitrarily or capriciously in applying its new policy on contract rates to past conduct. Retroactive application of policy is disfavored when the ill effects of such application will outweigh the need of immediate application, *NLRB v. Majestic Weaving Co.,* 355 F.2d 854, 861 (2d Cir. 1966), or when the hardship on affected parties will outweigh the public ends to be accomplished. *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947).

In this case, the Commission closely scrutinized the potential harm to BN that might result from enforcement of the agreed rate, finding not only that the rate would exceed BN's fully allocated costs of service, but also that public interest considerations strongly warrant holding these parties to their agreement. Applying the February, 1980 policy in this case will give BN the benefit of an agreement into which it freely entered. This is a "burden" only in comparison with the higher rate it seeks to obtain. Accordingly, it was reasonable for the Commission to conclude that the benefits from application of the February, 1980 policy clearly outweighed any adverse effects.[27]

F. Consolidated Appeal of Denial of Injunctive Relief

On the court's own motion, Cause No. 79-1676 has been consolidated with BN's present petition for review. This cause involves Iowa Power's attempt to secure injunctive relief against BN's attempted breach of the parties' rate agreement.

In a decision filed February 12, 1980, a divided panel of this court ruled that the court could, by means of injunction, prevent BN from breaching its agreement with Iowa Power. *Iowa Power and Light Co. v. Burlington Northern, Inc.*, No. 79-1676 (Feb. 12, 1980). On March 21, 1980, however, the court granted the railroad's petition for rehearing in that case.

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[27] BN raises the final point that the Commission's October 1, 1980 decision was not timely because 49 U.S.C. § 10327(g)(2)(B) required a decision within 120 days from the date reconsideration was granted. The time period began to run on May 7, 1980, the date this court remanded the case to the ICC. On September 4, 1980, the ICC pursuant to 49 U.S.C. § 10327(j) properly extended the date for its decision to October 3, 1980. The Commission's decision, decided September 29, 1980 and served October 1, 1980, was clearly timely.

While the petition for rehearing was pending, the Commission sought and received a remand of its July, 1979 decisions, thereby obtaining an opportunity to reconsider its refusal to enforce the agreed rate. Ultimately, the Commission on October 1, 1980 ordered BN to file within thirty-five days a rate consistent with the parties' agreement.

In view of the remand to the Commission and the ICC's October 1, 1980 decision enforcing the agreed rate, we have no reason to expect that injunctive relief is necessary to prevent BN's breach of contract. Interim events have completely eradicated the effect of the anticipated violation. Where these conditions are met, it is appropriate that we dismiss the case involving injunctive relief as moot. *County of Los Angeles v. Davis,* 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979); *Great Western Sugar Co. v. Nelson,* 442 U.S. 92, 99 S.Ct. 2149, 60 L.Ed.2d 735 (1979) per curiam); *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950). Accordingly, we vacate the judgment of the district court denying injunctive relief, dismiss Cause No. 79-1676 as moot, and remand the cause to the District Court for the Southern District of Iowa for entry of an order dismissing the action as moot.[28]

Iowa Power's petitions for review in Causes 80-1914 and 80-1915 have been withdrawn with the court's permission. Burlington Northern's petition for review in Cause No. 80-1959 is denied.

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[28] Of necessity, our decision vacating the judgment of the district court deprives that court's opinion of precedential effect. *County of Los Angeles v. Davis, supra,* 440 U.S. at 634 n.6, 99 S.Ct. at 1384 n.6.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 79-1676

IOWA POWER AND LIGHT COMPANY,
Appellant,
vs.
BURLINGTON NORTHERN, INC.,
Appellee.

September Session, 1980

Appeal from the United States District Court for the Southern District of Iowa.

The Court in cause number 80-1959 has denied Burlington Northern, Inc.'s petition for review of the decision of the Interstate Commerce Commission served October 1, 1980 (I & S 9199), and has dismissed as moot cause number 79-1676. Accordingly, upon receipt of this Court's mandate, the United States District Court for the Southern District of Iowa is hereby ordered to pay to Iowa Power and Light Company all moneys, and interest thereon, paid by Iowa Power and Light into the custody of the District Court pending resolution of appeals numbered 79-1676 and 80-1959.

May 8, 1981

APPENDIX C

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INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 9199

UNIT TRAIN RATES ON COAL—BURLINGTON NORTHERN, INC.

INVESTIGATION AND SUSPENSION DOCKET NO. 9199

UNIT TRAIN RATES ON COAL—BURLINGTON NORTHERN, INC.

Decided September 29, 1980

On further consideration, maximum reasonable rate prescribed for unit-train movement of coal from Belle Ayr, WY, to Council Bluffs, IA. Proposed increase in existing rate found not shown to be lawful.

Appearances as shown in prior decision.

DECISION

BY THE COMMISSION:

These proceedings all involve tariff schedules filed by Burlington Northern, Inc. (BN), which set out rates for unit-train movements of coal, in shipper-owned cars, from the Amax Mine (Amax) at Belle Ayr, WY, to Council Bluffs, IA. The movements are performed by BN for Iowa Power and Light Company (IP&L), a public utility engaged in the generation and transmission of electricity.

PROCEDURAL BACKGROUND AND PRELIMINARY MATTERS

I. & S. No. 9199 is an investigation proceeding instituted by the Commission after IP&L protested a rate of $7.38 per ton for the Belle Ayr to Council Bluffs movement which had been filed by BN. No. 36944 is the related complaint proceeding in which IP&L seeks prescription of a maximum reasonable rate for this movement. In a decision served July 13, 1979, we found the proposed rate not shown to be lawful and prescribed a rate of $7.25 per ton.

Both BN and IP&L sought judicial review of the Commission's decision. On January 24, 1980, the Commission filed with the United States Court of Appeals for the Eighth Circuit a Motion to Separate and Remand those proceedings involving the Belle Ayr to Council Bluffs

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[1] This decision also embraces No. 36944, Iowa Power and Light Company v. Burlington Northern, Inc.; No. 37322, Coal Belle Ayr and Eagle Junction, WY, to Council Bluffs, IA; and No. 37354, Iowa Power and Light Company v. Burlington Northern, Inc.

movement.[2] We proposed to reexamine our prior findings in light of a pending clarification and amplification of our policy on negotiated ratemaking.[3] The court granted this motion on May 7, 1980.[4]

No. 37322 concerns tariff schedules published by BN effective December 1, 1979, which increase the rate prescribed in our decision of July 13, 1979, by 5.5 percent. BN states that this increase reflects the cost-based portion of the general increase authorized in Ex Parte No. 357, *Increased Frt. Rates & Charges, Nationwide—8 Percent*, 359 I.C.C. 740 (1978), which, through tariff publishing error, was not originally made applicable to IP&L's Belle Ayr movement. IP&L has protested this filing. In the related complaint proceeding, No. 37354, IP&L again seeks prescription of a maximum reasonable rate for the involved movement. Nos. 37322 and 37354 were consolidated for joint disposition by decision served February 11, 1980.

IP&L has filed a motion to consolidate No. 37322 and No. 37354 with I. & S. No. 9199 and No. 36944. BN filed a reply in opposition to the motion. Because these proceedings all involve the same unit-train movement and parties and raise similar issues, the motion is granted. Consolidation of these proceedings for disposition in this decision will promote administrative economy and efficiency without prejudicing the interests of the parties. Timely execution of our functions under 49 U.S.C. 10707 and the importance of the negotiated ratemaking issue in the proceedings necessitate that we exercise our authority under 49 U.S.C. 10327(c) to void the requirement of an initial decision in Nos. 37322 and 37354.

BN has filed a motion to reopen the record in Nos. 37322 and 37354 for the submission of answers by IP&L to certain interrogatories. IP&L replied and stated that, without conceding the materiality of its responses, it does not oppose the motion. The motion is therefore granted, and the record is reopened for receipt of this material.

Finally, we note that BN and IP&L both have filed petitions to reopen the action of the Commission in the first instance and to reconsider our decision of July 13, 1979.[5] Each party replied to the other's petition. We believe it is appropriate to grant the petitions at this time, insofar as they seek reopening of the decision in I. & S. No. 9199 and No. 36944, and to consider the petitions in connection with the issue of negotiated ratemaking which led us to seek remand of these proceedings from the court.

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[2] The decision of July 13, 1979, also embraced No. 37021, Annual Volume Rates on Coal—Rawhide Junction, WY, to Sergeant Bluff, Iowa, and No. 37029, Iowa Public Service Company *v.* Burlington Northern, Inc., and Chicago and North Western Transportation Company. Because these proceedings do not present the issue of contract or agreed-to rates, they were not included in the remand motion and are outside the scope of the instant decision.

[3] A policy statement making this clarification was served on February 21, 1980, in Ex Parte No. 358-F, *Change of Policy, Railroad Contract Rates*.

[4] The court remanded cause numbers 79-1534 and 79-1747 in their entirety and cause numbers 79-1550, 79-1748, and 79-1749 insofar as they pertain to the Belle Ayr to Council Bluffs movement.

[5] BN styles its petition "Administrative Appeal of Initial Decision" because the July 13 decision did not specifically void the initial decision requirement. We reject the assertion that this decision is not administratively final. See *Rail Appellate Procedures—Revision of Rule 98*, 361 I.C.C. 591 (1979).

NEGOTIATED RATEMAKING—RECONSIDERATION

Before addressing the issue of negotiated ratemaking, we must respond to an initial objection by BN. The carrier argues that we are precluded from reconsideration of the decision in I. & S. No. 9199 and No. 36944 by the provisions of 49 U.S.C. 10327. Under subsection 10327(g), the Commission must complete reconsideration of a decision by the 120th day after the petition is granted. BN asserts that this time period began to run on January 17, 1980, when we voted to seek remand of these proceedings to reconsider the negotiated ratemaking issue, and expired on May 16, 1980.

It is unclear whether the deadline applies to these proceedings. Subsection 10327(g)(2), where the 120-day provision appears, speaks of "reconsideration of an action of the Commission that was taken by a division designated by the Commission." The decision in I. & S. No. 9199 and No. 36944 was a decision of the entire Commission in the first instance. Moreover, the 120 days begins to run "after the petition is granted." We did not grant any petition on January 17 but rather acted on our own motion.

Assuming that the time limitation in section 10327 does apply here, it could only have begun to run no earlier than May 7, 1980, when the court granted our request for the remand. It is of course possible for the Commission to reconsider a decision which is pending judicial review. Many times, however, administrative considerations and respect for the judiciary lead us to seek a remand of the decision before reconsideration. We do not believe that Congress intended to preclude such action by enacting section 10327. BN's interpretation would in effect eliminate any requests for remand before reconsideration because the Commission could never know if the request would be granted within 120 days. Thus, if section 10327 applies to this decision, the initial 120-day period would have expired on September 4, 1980, 120 days after the court granted a remand. Out of an abundance of caution, we issued a decision on September 3, 1980, pursuant to subsection 10327(j), extending the time period for final action to October 3, 1980. We therefore believe there can be no doubt of our ability to reconsider our prior decision.

In the prior decision in these proceedings, we declined to consider the alleged agreement between IP&L and BN relating to rates for the Council

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Bluffs movement because this agreement was reached before issuance of our policy statement in Ex Parte No. 358-F, *Change of Policy, Railroad Contract Rates,* served November 9, 1978. That policy statement encouraged the filing of contract rates in appropriate circumstances and made clear that rail contract rates were not considered to be illegal per se.[6] With respect to agreements reached prior to November 9, 1978, however, we believed at that time that the courts were the proper forum to determine whether a remedy for breach of such agreements existed. The policy concerns which have led us to change this view are set out in the further policy statement in Ex Parte No. 358-F served on February 21, 1980, and in *Increased Rates on Coal, BN, Montana to Superior, WI,* 362 I.C.C. 625 (1980). They need not be repeated here.

This later policy statement and the decision in *Increased Rates, supra,* indicated that alleged rate agreements should not be ignored in determining the reasonableness of a proposed rate merely because they were reached before a certain date. Rather, agreements reached before the 1978 Ex Parte No. 358-F policy statement should be considered on a case-by-case basis. The principal factors in this consideration are: (1) whether the parties indicated by their conduct an intent to be bound by the agreement, (2) whether the shipper reasonably relied on the agreement to its substantial detriment (*e.g.,* by making large capital investments that it would not otherwise have made), and (3) whether other public interest considerations warrant holding the parties to their agreement. Where these questions can be answered in the affirmative, the agreement will be given great weight and considered with all other factors bearing on the reasonableness of the proposed rate. We will now briefly summarize the pertinent facts and history of these proceedings before making this consideration.

IP&L is a public utility engaged in the generation and transmission of electric power in Iowa. In late 1972, it announced plans to construct a 600-megawatt coal-fired generating unit at its Council Blufffs, IA, power station.[7] This Unit No. 3 would join two smaller coal-fired units. Following its announcement, IP&L began a search for a source of low sulphur coal which could provide 2 million tons per year for a period of 20 years beginning in 1978. It contacted 14 companies in Colorado, Wyoming, Montana, and Utah stating its intention to arrive at a tentative decision on a coal source subject to development of satisfactory transportation arrangements. Proposals were received from seven coal producers.

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[6] See also our decision at 361 I.C.C. 205 (1979).

[7] This project was undertaken by a consortium of seven Iowa electric utilities. IP&L is the dominant member with approximately a 50-percent ownership interest. It had sole responsibility for design, construction, and operation of the facility, including responsibility for deciding upon the source and transportation of the fuel supply.

By letter dated June 15, 1973, IP&L entered into an agreement with Amax Coal Company for the purchase of 35 million tons of coal from its Belle Ayr, WY, mine at a rate of 2 million tons per year beginning in 1978. The agreement specifically stated that "execution of a mutally agreeable contract is contingent upon Amax's assistance, with Iowa Power, in negotiations to secure a satisfactory freight rate."

Shortly thereafter, IP&L began negotiations with BN on a freight rate for coal movements from Belle Ayr to Council Bluffs. BN is the only rail carrier serving the Belle Ayr mine. In a letter of June 26, 1973, BN offered a rate of $3.81 per net ton in carrier-owned cars and $3.21 per net ton in shipper-owned cars, subject to escalation under a formula previously furnished to IP&L. The first escalation would occur on July 1, 1974. The utility accepted BN's offer in a letter dated July 25, 1973. It then formally concluded a contract with Amax for the purchase of coal and advised BN of execution of this contract in November of 1973.

From this time until early in 1976, IP&L and BN had several meetings to discuss various terms of the tariff to be filed governing the Council Bluffs movement. Thus, on January 30, 1975, BN agreed that the rate should apply to movements of 100 cars aggregating 1 million tons of coal per year. On September 4, 1975, IP&L agreed to BN's standard price escalation formula. At no time, however, did either party question the level of the $3.21 base rate offered in BN's letter of June 26, 1973, and accepted by IP&L in its letter of July 25, 1973. Finally, BN transmitted to IP&L a letter of understanding memorializing the agreement on January 7, 1976. IP&L signed this letter on February 16, 1976. The letter of understanding included BN's standard escalation formula and a "Formula Intent" provision which reads as follows:

> It is the intent of both BN and the shipper that the formula described above will compensate BN for any increases in the cost of transporting the shipper's coal tonnages above the 1973 base cost level. If either party should suffer a gross inequity as a result of unusual economic conditions, which result in the formula failing to fairly cover cost increases, such inequities will be resolved by mutual agreement between BN and the shipper. Pending such agreement, neither party shall be relieved of its obligation as outlined in the current effective tariff and regular escalation shall continue using the above formula in the interim.

During the course of discussions with BN and after accepting the proposed base rate, IP&L expended substantial amounts required to implement the planned Council Bluffs movement. On July 25, 1974, it issued an order to purchase 242 cars at a total cost of over $8 million. The utility states that the number of cars ordered was based on BN's suggestion of two 110-car trains plus a 10-percent spare margin. IP&L also undertook to rebuild the spur track at its Council Bluffs power station to accommodate unit-train movements at a cost of $1.3 million. Construction of the new generating unit designed to burn low sulphur coal continued apace.

At some point in 1977, IP&L advised BN that it intended to begin shipping coal on January 1, 1978. In response, BN requested special permission of the Commission on November 4, 1977, to publish a rate of $5.23—the base rate of $3.21 as escalated under the agreed formula to its current level.

On December 2, 1977, however, BN advised IP&L that it would not publish the agreed-to rate of $5.23. This repudiation of the agreement was apparently a result of the recent Commission decisions, in *Incentive Rate on Coal—Smithers Lake, Texas,* 358 I.C.C. 537 (1977), and in *Incentive Rate on Coal—Cochise, Arizona,* 357 I.C.C. 683 (1977). These decisions, both served in November of 1977, approved capital incentive rate schedules on unit-train transportation of western coal under the provisions of 49 U.S.C. 10729. The rates approved were essentially those sought by the carriers, and, in mills per ton-mile, they were higher than the rate previously agreed upon by BN and IP&L. BN offered to publish a rate of $6.32 per ton and to keep that rate in effect without escalation until July 1, 1979. IP&L rejected this proposal in a letter of December 15, 1977. BN then informed IP&L in a letter dated December 23, 1977, that it was invoking the gross inequity provision of the agreement. It stated it would file with the Commission a notice of intent to publish a capital incentive rate of $7.38 per ton for the Council Bluffs movement. Pending resolution of that proposal, BN filed a rate of $5.23, the agreed-to rate, so that shipments of coal could commence. The $5.23 rate became effective on February 1, 1978, and had a cancellation date of June 30, 1978, the contemplated effective date of the capital incentive rate.

IP&L protested this capital incentive rate. In *Incentive Rate on Coal—Council Bluffs, Iowa,* 359 I.C.C. 201 (1978), the Commission concluded that the proposed rate did not qualify for capital incentive rate treatment. Following denial of its proposal for capital incentive rate treatment, BN filed an increase in the $5.23 rate[8] to $7.38. It is this increase which is the subject of these proceedings.

Evaluating the facts and argument of record in light of the three factors set out above, we conclude first that the parties have indicated by their conduct an intent to be bound by the agreement. BN proposed a rate for the Council Bluffs movement on June 26, 1973. IP&L accepted the offer on July 25, 1973. From this date until December 2, 1977, all discussions revolved around the rate of $3.21 per ton in shipper-owned cars contained in the June 26, 1973 letter. On November 4, 1977, BN actually sought special permission from the Commission to publish a rate of $5.23—the $3.21 rate as escalated annually pursuant to an escalation formula also referred to in BN's letter of June 26, 1973. This course of dealing over a period of 4 1/2 years without any change to the initially agreed upon base rate is strong evidence of an intent by both parties to be bound by the agreement.

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[8] Under the terms of the agreement, the $5.23 rate was subject to escalation to $5.62 on July 1, 1979. This rate was allowed to go into effect pending the investigation in I. & S. No. 9199

We recognize that a formal letter of understanding embodying the full agreement was not signed by IP&L until February 16, 1976. Discussions also continued on certain tariff terms until this date. We believe, however, that agreement on the base rate in 1973 is the crucial factor in discerning the intent of the parties. There is no evidence that this base rate was ever questioned by either party until late 1977. IP&L carefully had made its 1973 agreement with Amax subject to obtaining an acceptable freight rate for movement of the coal and only concluded a formal contract with Amax after agreeing to BN's proposed base rate. The presence of an annual escalation clause and a gross inequity provision in the agreement manifests a desire by both parties for an orderly and agreed mechanism for escalation of the base rate and resolution of any resulting unfairness. This set of factors proves BN and IP&L intended to be bound by their initial agreement on a base rate.

It is also clear that IP&L relied on the agreement to its substantial detriment. As noted above, the utility only concluded a formal contract with Amax after agreeing to BN's proposed rate. This contract requires it to purchase 35 million tons of coal over a 20-year period. IP&L also expended over $8 million for railcars in reliance on BN's rate for movements in shipper-owned cars and $1.3 million for spur track improvements to accommodate the projected unit-train movements. Construction of a generating unit designed to burn the Amax low sulphur coal proceeded. All these actions took place following agreement between BN and IP&L on the base rate.

Additionally, public interest considerations strongly warrant holding the parties to their agreement. Our Nation's reliance on the use of coal for generation of electric power is increasing. Rail carriers have an important role to play in this area. Negotiated ratemaking carriers great promise for improved service, stable rate levels, and needed innovative rail pricing on movements of coal as well as other commodities. Failure to hold the parties to their agreements in these and other proceedings could discourage negotiated ratemaking for it might belie our strong commitment to support such efforts by both carriers and shippers. Moreover, effective judicial remedies for BN's breach of its agreement are unlikely to be available to IP&L if this Commission finds the increase filed by BN to be just and reasonable. See our February 21, 1980, policy statement in

Ex Parte No. 358-F, pp. 2-3, and *Increased Rates, supra*, pp. 636-637. Thus, the agreement between BN and IP&L must be given great weight in considering the reasonableness of BN's proposed rate increase.

A final public interest consideration is whether enforcement of the base rate and escalation formula in the BN-IP&L agreement will result in a gross inequity to either party or will otherwise contravene Commission standards for determining rate reasonableness. This determination can be made by comparing the agreed rate with the costs of the Council Bluffs movement. Because the petitions to reconsider the decision of July 13, 1979, filed by BN and IP&L principally raise cost issues, we have deemed it appropriate to grant these petitions in connection with analysis of the negotiated rates issue. Our disposition of the cost issues is set out in appendix A of this decision. We are in the process of reevaluating our treatment of costs and expenses in these and other areas. However, we believe that the analysis in the appendix to this decision accurately reconciles the costs of record.

The consideration of the parties' arguments in appendix A has been guided inpart by the views expressed by the United States Court of Appeals for the D.C. Circuit in No. 78-2051, *San Antonio, Texas* v. *Interstate Commerce Commission*, decided June 9, 1980. In particular, we have adjusted the treatment of fixed plant investment and deferred taxes made in the July 13, 1979 decision. The methods employed for these adjustments have been dictated in large part by unavoidable time constraints and by the limitations of the present record with respect to cost evidence. Thus, their use here does not imply that these identical methods will be used in subsequent proceedings.

Even ignoring the adjustments to restated costs made in the appendix, the agreement rate of $5.62 per ton substantially exceeds the total variable cost (at the embedded debt level) of $4.78 per ton found in the decision of July 13, 1979; it also exceeds the total variable cost (at the revenue need level) of $5.23 per ton found in that decision. The negotiated rate thus obviously contributes to BN's going-concerrn value since it covers variable costs of service. But it is not so much below the restated fully allocated costs at the revenue need level of $6.78 per ton found in the prior decision as to constitute a gross inequity for BN.

The agreement rate of $5.62 per ton is extremely close to the restated fully allocated costs at the revenue need level of $5.53 per ton developed in the instant decision. It is also not so much above the variable cost (at the embedded debt level) of $4.56 per ton or the variable costs (at the revenue need level) of $4.58 per ton found here as to constitute a gross inequity for IP&L. Thus, even comparing the agreement rate to the restated costs more favorable to each party, we find no compelling reason in the cost evidence to reach a conclusion different from that indicated by other factors on the negotiated rate issue.

In summary, we find that BN and IP&L intended to be bound by their agreement on a rate for the Council Bluffs movement. IP&L expended large sums in reasonable reliance on this agreement, and public policy considerations warrant enforcement of the agreement. The cost evidence indicates that enforcement of this agreement will not result in a gross inequity to either BN or IP&L and will be in general harmony with Commission standards in determining the reasonableness of rates where rate agreements are not an issue. We therefore conclude that the proposed rate of $7.38 per ton has not been shown to be reasonable. The maximum reasonable rate for the Council Bluffs movement is $5.62 per ton effective July 1, 1978, as escalated annually under the escalation formula agreed upon by BN and IP&L.

BN has made several arguments of a general nature against application of our negotiated ratemaking policy in I. & S. No. 9199 and No. 36944. We do not find them persuasive.

First, BN contends that enforcement of the agreement rate would violate the rule of ratemaking set out at 49 U.S.C. 10704(a)(2). This provision requires the Commission to assist rail carriers in attaining railroad revenue levels adequate to cover total operating expenses plus a reasonable and economic profit or return (or both) on capital employed in the business. We do not read this provision as mandating that in every rate proceeding the rail carrier be granted the full increase sought with disregard for the cost evidence and other relevant circumstances. Moreover, we believe that the negotiated ratemaking policies which will be promoted by enforcement of the agreed rate in these proceedings will in the long run be of great value in helping BN and other carriers not now experiencing adequate revenue levels to attain the return described by the rule of ratemaking.

BN next argues that application of our new policy on negotiated rates in these proceedings will violate section 553 of the Administrative Procedure Act (5 U.S.C. 553) because we did not seek comments before issuing the further policy statement in Ex Parte No. 358-F on February 21, 1980. The February 21 issuance, however, was a general statement of policy within the meaning of 5 U.S.C. 553(b)(A). In this circumstance, the Administrative Procedure Act does not mandate a notice and comment period before the policy can be applied. As the courts have made clear, the practical effect on a proceeding determines whether an agency formulation is a rule or a general statement of policy. A policy statement announces an agency's general intentions for the future, and if the agency seeks to apply the policy in a particular situation it must be prepared to support the policy as if the policy statement had never been issued. It cannot issue a general policy statement and later claim that a challenge to application of the policy to a particular situation is foreclosed by the prior policy statement. The agency must be left free to exercise its informed discretion in the situations that arise. *Pacific Gas & Electric Co.* v. *F.P.C.*, 506 F. 2d 33, 38 (D.C. Cir. 1974); *Guardian Federal S&L* v. *Federal S&L Ins. Corp.*, 589 F. 2d 658 (D.C. Cir. 1978).

The February 21 statement clearly expressed the Commission's intention to consider alleged rate agreements entered into prior to November 9, 1978, on a case-by-case basis. The presence of an agreement would be one factor to be considered with other factors in determining the reasonableness of a proposed rate. This weighing process allows the Commission significant discretion in applying the policy to different factual situations. In this decision, we have fully explained and supported our decision to enforce the agreement. BN has had an opportunity to file a separate brief addressing the negotiated ratemaking issue. We thus conclude that application of this policy in these proceedings does not violate any provision of the Administrative Procedure Act.

Closely related to its position concerning the Administrative Procedure Act is BN's contention that retroactive application of the policy set forth in the February 21, 1980 statement is unwarranted in the circumstances. BN contends that a policy statement may be applied retroactively only when any benefits from retroactivity outweigh any adverse effects to private interests. According to BN, important factors in this judgment are: (1) whether the case is one of first impression, (2) whether the new policy is an abrupt departure from well established practice, (3) reliance on the old policy by the party against whom the new rule is applied, (4) the burden retroactivity imposes on a party, and (5) the statutory interest in applying the new policy. *Retail, Wholesale & Department Store Union, AFL-CIO* v. *NLRB*, 466 F. 2d 380, 390 (D.C. Cir. 1972). We believe a weighing of these considerations supports application of the policy in these proceedings.

These proceedings admittedly do not present an issue of first impression. Some may perceive the new policy as an "abrupt departure" from a line of relatively early decisions by this Commission. It is a logical outgrowth, however, of the concerns enunciated in the first policy statement in Ex Parte No. 358-F issued on November 9, 1978, and of our continuing concern that some remedy be available to a party for violation of a rate agreement. It is difficult to see how BN relied on the former policy, which was based on a belief that such a remedy, if available, lay with the courts. The record indicates that BN deviated from its agreement with IP&L because certain decisions gave it the mistaken impression that the

Commission would approve a capital incentive rate higher than the agreement rate. If BN relied on the former policy as insuring that the Commission could take no cognizance of this deviation, it was incorrect. We do not consider an interest in the ability to avoid agreements as worthy of protection. Retroactive application of the negotiated ratemaking policy will give BN the benefit of an agreement into which it freely entered. This is a "burden" only in comparison with the higher rate it seeks to obtain. We believe that the statutory interests of increased competition and flexible and innovative ratemaking expressed in the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31 (4R Act), would be significantly frustrated by failure to apply the new policy in these proceedings. As indicated above, our failure to recognize the parties' reasonable expectations in reliance on a rate agreement would imply a lack of commitment to negotiated ratemaking. It would also be inconsistent with encouragement of increased use of coal which is the basis for numerous recent enactments by Congress. In these premises, and weighing the factors discussed above, we find that the benefits of application of the policy stated on February 21, 1980, clearly outweigh any adverse effects.

Finally, BN contends that the Commission has no authority to enforce or apply rate agreements. It relies principally on a recent decision in the District of Columbia Circuit, *American Broadcasting Companies, Inc.* v. *FCC*, No. 79-1968, decided April 28, 1980 (*ABC*), and cases cited therein. We do not agree with BN's interpretation of this decision.

The *ABC* decision and the line of decisions on which it relies establish only that parties cannot by their own agreement alter or affect the legality and enforceability of a rate that has been approved or allowed to go into effect by the regulatory agency. None of these decisions establish the very different proposition which is at issue in these proceedings that the Commission is legally precluded from considering and giving weight to a rate agreement between the parties when it determines whether a filed tariff is reasonable. Indeed, the court in *ABC* expressly stated that it was not reaching that issue (slip op. 12 and note 5).

In *ABC*, the District of Columbia Circuit affirmed a decision of the Federal Communications Commission which declined to reject a tariff that was challenged on the ground that it increased the carrier's rates in violation of a contract between the carrier and two of its customers. In its analysis, the court examined the legislative history of the Interstate Commerce Act from which the Communications Act borrowed its language and purpose. The court explained that the main purposes of the Interstate Commerce Act were (1) to prevent unjust and unreasonable rates, and (2) to secure equality of rates to all and destroy favoritism. The act accomplished these purposes by requiring carriers to publish tariffs whose lawfulness would be determined exclusively by the Commission; by prohibiting secret departures from such tariffs; and by forbidding rebates, preferences and other forms of undue discrimination. Accordingly, the court concluded that under the Communications Act, as under the Interstate Commerce Act, the private agreement of the parties could not itself determine the lawfulness of a particular rate—that is, could not compel the Commission to accept or reject a particular tariff or affect the legality of a tariff approved by the Commission.

The court also relied on *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908). *Armour* affirmed a prosecution for violations of the Elkins Act, which makes it unlawful for a carrier to deviate from the published schedule of rates and charges or for a shipper to receive a concession from the duly filed rate. The shipper had contracted with the railroad to carry shipments at a certain rate for 7 months and an appropriate tariff was filed. The prosecution arose because the shipper continued to pay the rate even after the carrier published and filed a tariff specifying a higher rate. The defendants argued that the act could not render the parties' contract illegal. The court found, however, that to allow secret rate agreements which deviate from the lawfully filed tariff would violate the very purposes of the act, which is to require all shippers to be treated alike and that rates be known by and available to all through public tariff filings. 209 U.S. at 80-81.[9]

In sum, what *ABC*, *Armour*, and other cases have consistently held is that parties may not, by their own agreements, alter the legality and binding effect of tariffs that have been approved or allowed by the Commission, and cannot compel the Commission to accept or reject a particular tariff. We agree fully with that principle. Indeed, it was that well established principle that led the Commission in its policy statement of February 21, 1980, to conclude that the Commission itself should consider claims by shippers that filed tariffs exceeding existing rate agreements, when it is deciding whether to approve or allow a tariff to become effective. Otherwise, once a tariff becomes legally effective, the shipper has no judicial or other remedy for the carrier's repudiation of its agreement, even if the shipper substantially relied on it.

But no case, including *ABC* and *Armour*, has held that the Commission is precluded by the statute from considering and giving weight to an existing agreement between the parties as one of a number of factors bearing on the reasonableness of a tariff filing. Indeed, the court in *ABC* specifically "emphasized that we need not and do not determine the nature and extent of the Commission's power" to authorize the filing of contracts. (Slip op. 12, note 5.) Furtherance, any such proposition would make little sense. If in fact a carrier has acted unreasonably, or even unconscionably, by filing a tariff repudiating an agreement that the shipper has reasonably and substantially relied on, we can see no sound basis for concluding that the Commission must disregard that fact in deciding whether the carrier's rate is unreasonable. This would contravene the 4R Act's requirement that we balance the rights of shippers and carriers.

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[9] This holding from *Armour* has also been applied in *Farley Terminal Co., Inc.* v. *Atchison, T. & S.F. Ry.*, 442 F. 2d 1095, 1098 (9th Cir. 1975), where lease agreements for trailer-on-flatcar service were the only method of determining the charges, since no tariffs were on file to cover the transportation. When tariffs were later filed, the court found that the higher rates in the tariffs must control rather than the lease agreements, based on the principles enunciated in *Armour*.

Finally, many of the reasons advanced in *ABC, Armour* and other cases in upholding the Commission's authority to disregard private agreements affirmatively support the Commission's decision to consider them. Thus, in this case, unlike *Armour*, the Commission is not allowing a secret agreement to govern rates for particular parties. Instead, the Commission will order the prescribed rates to be filed in appropriate tariffs, thus providing the public the proper notice that the act contemplates. The Commission's policy, therefore, fits within the statutory scheme that only lawfully filed, public tariff rates may be charged for transportation services.

Likewise, the policy recognizes that the only method of changing a rate is by filing a new tariff, and the policy does not prohibit carriers from freely filing changed tariffs. It does not allow an unpublished agreement to alter a tariff, such as was condemned in *Armour* and *ABC*. The Commission's policy is only that allegations of rate agreements will be considered relevant to rate reasonableness by the Commission. The policy explicitly acknowledges that an agreed rate is not controlling and may not be prescribed in all cases. Thus in its further policy statement, served February 21, 1980, the Commission stated at page 4:

> For example, the Commission might determine that a contract rate should not be enforced if it failed to contribute to the going concern value of the carrier as required by 49 U.S.C. 10701(b) or is likely to imperil the carrier's ability to provide essential rail service to the public.

Additionally, the Commission's policy, which was applied in this decision, ensures that rate agreements will not result in the kind of discrimination among shippers that was the underlying concern in cases like *Armour* and *ABC*. The Commission's first policy statement on rate contracts in November 1978 reflects the Commission's recognition of its current statutory obligation to prevent undue discrimination.

No. 37322 AND No. 37354

Our conclusions in I. & S. No. 9199 and No. 36944, the proceedings remanded by the court for further consideration of the negotiated ratemaking issue, are equally applicable to the subsequent increase filed by BN. This increase is the matter under consideration in No. 37322 and No. 37354.

The evidence of record in these proceedings as well as that in the remanded proceedings support our prior finding in No. 37322 and No. 37354 that BN has market dominance over the Council Bluffs movement. In these proceedings, BN seeks to impose the 5.5-percent cost-based increase approved in Ex Parte No. 357, a general increase proceeding. This type of increase is covered by the annual escalation formula that is a part of the rate agreement between IP&L and BN.

We have concluded that this agreement should be given effect, and that enforcement of the agreement does not result in a gross inequity to either party. BN argues that it is entitled to take this increase, as proposed, because its failure to do so in the context of the Ex Parte No. 357 was inadvertent. We find this argument unconvincing. Given our aproval and enforcement of the agreement, BN would be entitled to this increase only if it demonstrated a gross inequity under the terms of the escalation formula. It has failed to make this showing. Thus, we conclude that the proposed increase has not been shown to be reasonable. The maximum reasonable rate for the Council Bluffs movement is the $5.62 rate effective July 1, 1978, as escalated annually under the agreement escalation formula.

On February 13, 1980, the United States Court of Appeals for the Eighth Circuit issued a preliminary injunction in No. 79-1676, *Iowa Power & Light Co.* v. *Burlington Northern*, which prevents BN from collecting any charges in excess of the agreement rate for the Council Bluffs coal movement.[10] IP&L has paid the difference between the agreement rate and any tariff on file into an escrow account. Because of this injunction, prior injunctions, and suspension of the proposed increase by the Commission in I. & S. No. 9199, it does not appear that BN has ever received any payments from IP&L in excess of the agreement rate. For this reason, no refund order is necessary in this decision.

Any arguments or requested findings not specifically discussed in this decision or not reflected in our findings and conclusions have been considered and found not justified or their resolution unnecessary for disposition of these proceedings.

We find:

Burlington Northern, Inc. has market dominance over the Belle Ayr to Council Bluffs unit-train coal movement at issue in these proceedings.

Burlington Northern, Inc. and Iowa Power and Light Company have not suffered any gross inequity in application of the agreed rate to this movement and escalation of this rate in accordance with the escalation formula in their letter of agreement.

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[10] The Commission filed a petition for rehearing *en banc* of this decision which was granted on March 21, 1980. No further action has been taken by the court to date.

The proposed rate of $7.38 per ton in I. & S. No. 9199 has not been shown to be reasonable and lawful. The proposed 5.5-percent increase in No. 37322 has not been shown to be reasonable and lawful. The maximum reasonable rate for the Council Bluffs unit-train coal movement is the rate of $5.62 per ton effective July 1, 1978, as escalated annually under the escalation formula found in the letter of agreement between Burlington Northern, Inc. and Iowa Power and Light Company.

This decision will not significantly affect the quality of the human environment. We believe that it will significantly assist national energy objectives concerning the use of domestic coal resources.

COMMISSIONER CLAPP, concurring:

I agree with the underlying rationale of the majority. However, I question whether the substitution of incremental fixed plant investment for Rail Form A road property calculations is warranted here. In effect, this excludes from consideration any roadway investment made prior to the last several years. Potentially, this approach could miss large portions of investment used in connection with particular coal movements.

I am afraid that the *San Antonio* court may have misunderstood this crucial point. It seems to say that if, for example, we were to use an incremental fixed plant investment approach for new track investment on only one of several line segments, we would have to exclude all Rail Form A track investment for all line segments. Since the evidence in *San Antonio* was not presented on a line segment by line segment basis, the court may not have intended this. However, we should use a common sense approach in interpreting the *San Antonio* decision. In this proceeding, I believe that Rail Form A roadway calculations, and not the incremental fixed plant additive, are a more appropriate proxy of the actual investment costs attributable to this movement. Changing this figure would not, however, affect the result in this case.

It is ordered:

The prior decision in I. & S. No. 9199 and No. 36944, served July 13, 1979, to the extent inconsistent with the conclusions here, is vacated and set aside.

On or before 35 days from the service date of this decision and upon not less than 1 day's notice to the Commission and the general public, Burlington Northern, Inc. shall cancel the schedules under investigation to the extent found not shown to be reasonable or in excess of the maximum reasonable rate prescribed in this decision. It must file new schedules consistent with the findings in this decision on not less than 5 days' notice in the manner prescribed by the Commission.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis, and Gilliam. Commissioner Clapp concurring with a separate expression.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

APPENDIX A

The petitions for reconsideration in I. & S. No. 9199 and No. 36944

As noted in the body of the instant decision, the parties' cost arguments on petitions are relevant to the issue of negotiated ratemaking in I. & S. No. 9199 and No. 36944. An analysis of these arguments follows a brief discussion of two other matters raised on petition.

Each party objects to the use of a 7-percent increment above fully allocated costs in the prescription of a maximum reasonable rate in the July 13, 1979, decision. The conclusion in the instant decision with respect to the issue of negotiated rates renders discussion of this matter unnecessary. BN also contests the finding that it has market dominance over the Council Bluffs movement. It argues that the possibility of IP&L switching to another source of coal precludes such a finding. This argument is unconvincing. IP&L has signed a long-term coal supply contract with a specific mine and has invested in facilities in connection with coal movements from that specific origin IP&L signed this contract only after it had entered into a firm agreement with BN regarding the transportation rate. In these circumstances, BN clearly has market dominance over the involved movement.

With regard to costing procedures, BN first asserts that the ratio (or dollar) basis should not be used for allocating fixed constant costs to the Council Bluffs coal movement. It contends that the ton/ton-mile method has been the standard approach in the past and should be applied here. The Commission has stated in the past that the determination of one method as preferable to another method of allocating costs in a particular situation is a ratemaking function. In these proceedings as in other recent proceedings involving western coal movements, it has concluded that the ratio basis should be utilized in allocating constant costs to heavy-loading and long-haul movements such as coal.

In deriving locomotive and caboose capital costs for the involved movement, the prior decision employed a "rental payment" method based on recent equipment trust certificate rates instead of the overall cost of capital. BN believes this method incorrectly understates capital costs for this equipment. The "rental payment" method is designed to reflect that the equipment is not dedicated to the service of a particular shipper and that it is possible to procure such equipment under more favorable terms than outright purchase. These are valid considerations in allocating equipment costs. BN points out that an overall cost of capital figure was assigned to locomotives in formulating car rental (per diem) charges in the various decisions in Ex Parte No. 334, *Car Service Compensation—Basic Per Diem Charges.* The purpose of that proceeding was to encourage investment in cars. Furthermore, per diem charged under Ex Parte No. 334 for the use of a single car depends upon the age, mileage, and cost of the specific identified car. The "rental payment" method used in these proceedings, however, is for the allocation of the average costs of a pool of cars involved in coal service. Adoption of a particular method in Ex Parte No. 334 therefore does not necessarily require adoption of the same method in the proceedings under consideration.

BN next challenges the treatment of the annuity calculations required to develop incremental fixed plant investment costs. Fixed plant investment is separated into operating expense and capital investment portions, and each portion is treated separately over the life of the investment.

Coal-related operating expenses have been distributed evenly over the estimated 20-year life of the involved track through the use of annuity calculations. The prior decision determined that the coal-related portion was 66.7-percent of the total operating expense based on the carrier's assertion that track devoted to noncoal service has an estimated useful life of 40 years (as opposed to a 20-year life for coal-related track). BN argues that the proper allocation of operating expenses due to coal traffic is 78 percent. It arrives at this figure by simply expressing the noncoal-related operating expenses actually charged to income from 1976 through 1979 in future annual divisions over the 40-year estimated life of noncoal track material. The carrier does not present any evidence of actual traffic ratios between coal and noncoal service.

BN's position that expended dollar amounts represent the future annual operating expenses associated with noncoal service over the next 40 years is not valid. The cost of replacing track material during this time will all too likely be greater due to inflation than a simple division of the 1976-79 claimed operating expenses. Any understatement of the future operating expenses assigned to noncoal service results in an overstatement of operating expenses assigned to coal service.

The annuity calculations thus properly reflect BN's evidence that coal-related operating expenses are twice those of noncoal expenses, based on estimated track life. The 66.7 percent apportionment factor has been applied directly to the claimed operating expenses assigned to coal service for each of the years 1976 through 1979. In the absence of actual traffic ratios for coal and noncoal service, this method best reflects the proper allocation of operating expenses incurred.

The July 13, 1979, decision depreciates over a 20-year period the entire capital portion of the incremental fixed plant investment. BN contends that the entire portion is not depreciable and proposes to apply its overall ratio of depreciable road property to total road property to the capital investment in these proceedings. Some part of the capital investment here under consideration does represent investment in nondepreciable property. BN, however, has not submitted any evidence and supporting material to establish the actual depreciation ratios for incremental fixed plant investments associated with unit-train coal movements. Use of BN's overall system ratio would be extremely arbitrary. The evidence of record thus does not provide any basis for a meaningful reduction in the amount of capital investment to be depreciated.

BN further contends that the service life of locomotives used for unit-train coal movements is approximately 15 years and objects to the use of a 23-year average. This carrier has stated on the record, however, that it will not attempt to keep these locomotives in coal service for their entire lives but will place them in less demanding service as they age. It also has not submitted any data concerning the actual service life of specific locomotives in coal service. In these premises, IP&L's estimate of 23 years is the best evidence of record.

In the prior decision in these proceedings, IP&L's loop track adjustment was accepted. BN asserts that this is inconsistent with other western coal proceedings where the loop track adjustment for origin and destination switching was rejected. It argues that the utility's use of line-haul costs distributed over ton-miles reflects trains moving 20 times faster than a unit-train actually moves during loading. BN thus believes this approach fails to develop actual switching costs during loading and unloading.

Contrary to BN's position, the treatment of the loop track adjustment in these proceedings is consistent with that made in *Incentive Rate on Coal—Smithers Lake, Texas*, 358 I.C.C. 537 (1977), and in *Incentive Rate on Coal—Cochise, Arizona*, 357 I.C.C. 683 (1977). Even though these decisions accepted the railroads' cost estimates, the origin and destination switching costs were developed differently than BN's estimates in these proceedings.

In *Smithers Lake*, the railroads, instead of using Rail Form A road train to industry switching expenses, developed their own estimate of added expenses of loading and unloading the coal unit-train with railroad-owned locomotives. They constructed an engine-minute unit cost which excluded all motor power investment and crew wages. Also excluded were all "yard specific expenses" and the road property and land investment allocated to train switching. The protestant in *Smithers Lake*, however, submitted no cost figures for this item. The Commission thus concluded that the railroads' cost estimate was acceptable. In *Cochise*, the matter was handled in a similar fashion where the carrier specifically developed costs used in lieu of Rail Form A origin and destination costs.

In the proceedings here under consideration, BN has adjusted its Rail Form A cost per switch engine-minute by a locomotive unit weight factor. It has not attempted to eliminate from the cost per switch engine-minute the service features which are not applicable to coal unit-train movements over track and land owned by the mine and utility. Given these deficiencies in BN's evidence, the utility's treatment of the loop track adjustment merits acceptance.

Finally, BN asserts that the prior decision erred in not assigning sufficient weight to comparison of the rate under consideration with rates previously approved for western coal movements. Rate comparisons at best are useful as rough estimates of rate reasonableness but cost evidence must take precedence. This is especially true in a dynamic and evolving area such as western coal rates. There is thus no error in the prior decision's primary reliance on the parties' cost evidence.

IP&L also takes issue with certain aspects of the restatement of costs for the Council Bluffs movement which was made in the prior decision in these proceedings. One objection by the utility goes to the use of the current round trip cycle time in this restatement. IP&L contends that an average cycle time reflecting the current time and the projected time resulting after planned construction in physical plant is complete should be used. It believes that is unreasonable for the ratepayer to bear the costs both of the plant investment and of the longer cycle times that are necessitated by ongoing construction projects.

Use of an average of the present and projected cycle times, however, would in effect result in a failure to cover the costs of the present operation. Moreover, the projected cycle time is speculative and there is no assurance that the large investments required to obtain this cycle time will actually be made. IP&L can of course file a complaint in the future if it believes that a reduced cycle time makes the then current rate unreasonable. The rate prescribed for the present, however, must reflect current operating conditions.

IP&L next alleges that the fully allocated cost developed for the Council Bluffs movement is overstated by the inclusion of a 25-percent upward adjustment to systtem average figures for locomotive repairs and fuel expenses and by acceptance of BN's crew wage estimates. This argument is without merit. The adjustment for locomotive repairs and fuel expenses based on the class and weight of the locomotive to be used in the unit-train movement was fully substantiated by BN. The carrier's crew wage estimates were accepted only after evaluation of each party's evidence and argument in this area. IP&L has not advanced any new arguments on petition to support reversal of the prior acceptance of BN's estimate as the best evidence of record.

IP&L further challenges the use of a fixed plant investment additive in the absence of an adjustment to Rail Form A to delete the railroad's additive for return on fixed plant investment. It asserts that both of these calculations represent the same investment base. BN, on the other hand, argues the Rail Form A additive reflects incremental investments (which may or may not be line specific) that are caused by general traffic (including coal) and that do not include any of the coal-related fixed plant investments. The separate fixed plant investment additive is alleged to reflect IP&L's portion of the line-specific roadway investment which is solely attributable to coal.

The parties' arguments on petition and in their original pleadings have been fully considered. This consideration has been made in light of the decision issued by the United States Court of Appeals for the District of Columbia Circuit on June 9, 1980, in No. 78-2051, *San Antonio, Texas* v. *Interstate Commerce Commission.* These considerations lead to a conclusion that the treatment of these costs in the July 13, 1979, decision results in an unacceptable double count of investment costs. Contrary to BN's assertion that the fixed plant investments here are made exclusively for the benefit of the involved coal traffic, it is apparent that other traffic using the track line segments will also benefit from the improved plant. The prior procedure also resulted in certain costs, such as rail, being assessed against IP&L twice; the fixed plant investment additive includes costs for heavier coal-related rail while the Rail Form A additive includes predicted system average costs for all other rail. This procedure thus tends to assess all costs for coal-related fixed plant and some costs for other fixed plant against IP&L while noncoal shippers could benefit from the coal-related investment without bearing any of the costs.

To correct this tendency in the prior method, the restated cost items for the Council Bluffs movement from the July 13, 1979, decision have been reformulated. They have been recalculated by removing the return on road property included in the Rail Form A fully allocated cost level while retaining the costs (including return) shown for the fixed plant investment additive. Of course, this is not the only method which could be employed to eliminate the double count problem. Given existing time constraints and the evidence of record, it is the preferable method. It is also fully consistent with the court's conclusions in *San Antonio, supra.*

Finally, IP&L questions the treatment of Federal income taxes in the decision of July 13, 1979. It argues that the Commission's election to normalize taxes for ratemaking purposes is not supported by the record and that, even if normalization is used, the Commission should have deducted deferred taxes from the net investment base prior to calculating the overall "cost of capital." In reply, BN supports the procedures adopted in the prior decision.

There is no merit in IP&L's first contention regarding normalization of taxes. Deferred taxes must eventually be paid and cannot be ignored as a cost item. Allowing a carrier to retain the tax benefit of accelerated depreciation (the primary cause of deferred taxes) provides an incentive for investment. Moreover, this approach to tax normalization is in accord with the policy previously enunciated in *Establishment of Adequate Railroad Revenue Levels,* 358 I.C.C. 844 (1978), as modified at 359 I.C.C. 270 (1978). The decision to normalize Federal taxes thus is supported by sound policy considerations and is consistent with prior Commission decisions.

Once the decision to normalize taxes is made, however, deferred taxes should be deducted from the net investment base prior to calculation of any overall cost of capital. The capital funds arising from deferred taxes have been contributed by the ratepayers. Normalization makes it possible for carriers to receive and retain revenue which is not at the time accounted as income. It is thus appropriate to deduct the amount of deferred taxes from the investment base on which an overall rate of return is to be calculated. The decision of July 13, 1979, did not make this adjustment.

Deferred taxes can be considered as in the nature of interest free loans from the government. Because the rail carrier enjoys these funds without any interest charges, it is appropriate to assign no cost to them in calculating the overall cost of capital figure. The 10.6-percent cost of capital figure utilized in the prior decision has thus been adjusted to reflect a zero cost for funds related to deferred taxes. This recalculation gives a new overall cost of capital figure of 9.93 percent.

The prior calculation for fixed plant investment in dollars per ton which appeared at pages 117-119 of appendix A to the July 13, 1979, decision calculated the tax shield on a straight line basis. In order to flow through to the shipper the benefits of accelerated depreciation, this depreciation tax shield has been restated to include the benefits of accelerated depreciation. This adjustment is necessary in order that the treatment of deferred taxes in these proceedings be consistent.

A recalculation of the restated costs of the Council Bluffs movement to eliminate any double count of the fixed plant and to give proper weight to deferred taxes results in a new fully allocated cost at the "revenue need" level of $5.53 per ton. The methods adopted for accomplishing this recalculation have been chosen in light of the present evidence of record and existing time constraints. Although different methods for accomplishing the same ends may eventually be adopted in Ex Parte No. 347, *Western Coal Investigation—Guidelines for Railroad Rate Structure*, the methods used here adequately portrary the involved cost items for purposes of comparing the movement's cost to BN with the negotiated rate.

APPENDIX B

RESTATEMENT OF COST AND FINANCIAL EVIDENCE
IN
I. & S. NO. 9199 AND NO. 36944
ANNUAL VOLUME RATES ON COAL—
BELLE AYR, WYOMING, TO
COUNCIL BLUFFS, IOWA

The initial analysis of the cost and financial evidence in this case can be found in appendixes A through F of the Interstate Commerce Commission's July 13, 1979, decision in I. & S. No. 9199 *Unit Train Rates on Coal—Burlington Northern, Inc.* As a result of the consideration discussed in the body of the instant decision, it is necessary to modify two portions of the initial analysis. These modifications are set forth below.

Cost of capital—present (Rail Form A) investments.—In the initial analysis the cost of capital was not adjusted to consider the impact of deferred income taxes. Rather, consideration of that issue was deferred to the present rulemaking proceeding on western coal rates, Ex Parte No. 347, *Western Coal Investigation—Guidelines for Railroad Rate Structure.* Consequently, the after-tax cost of capital for present (Rail Form A) investments was calculated to be 10.6 percent. The pretax cost of capital was determined to be 17.2 percent. The effect of deferred income taxes, however, must be considered. The cost of capital has thus been recalculated by assigning a zero return to that portion of the railroad's capital structure represented by deferred income taxes.

Upon examination of the Burlington Northern's 1977 annual report data it was ascertained that 6.34 percent of the railroad long-term capital structure was made up of deferred income taxes. When a zero rate of return is assigned to this part of the capital structure of the railroad the after-tax cost of capital declines from 10.6 percent to 9.9 percent while the pretax cost of capital is lowered to 16.1 percent. These new cost of capital figures have beei calculated in the following manner.

After-tax cost of capital

	Capital mix[1]		Cost rate		Weighted average
			Percent		*Percent*
Debt	.3746	x	7.0	=	2.6
Equity	.5620	x	13.0	=	7.3
Deferred income tax	.0634	x	0.0	=	0.0
	1.0000				9.9

Pretax cost of capital

	Capital mix[1]		Cost rate		Weighted average
Debt	.3746	x	7.0	=	2.6
Equity	.5620	x	24.0	=	13.5
Deferred income tax	.0634	x	0.0	=	0.0
	1.0000		0.0		16.1

[1] Since 6.34 percent of the capital structure is assumed to be deferred income taxes the remaining 93.66 percent is comprised of long-term debt and equity. Using the traditional 40-percent debt, 60-percent equity capital structure, the debt portion of the capital structure is now 37.46 percent (93.66 percent x 0.40) and the equity portion 56.20 percent (93.66 percent x 0.60).

Depreciation tax shield.—On page 117 through 119 of appendix A of the July 13, 1979, decision in I. & S. 9199, the tax shield resulting from the use of straight line depreciation is discussed. To treat deferred taxes consistently, the benefits of deferring income taxes should be flowed through to the shipper. The depreciation tax shield has been restated to flow through the benefits of accelerated depreciation (deferred taxes using a sum of the years digits methodology). This restatement has resulted in recomputation of the tables on pages 118 and 119 of appendix A. These recomputations are set forth below.

This calculation is based upon an annual volume of 2,300,000 tons and the 1976 New Fixed Plant Investment.

	Operating expense	Capital investment
1. Totals	$449,202	$780,981
Development of unit costs		
2. Apportion to coal	0.667	1.0
3. For Council Bluffs (L. 1 x L. 2)	$299,618	$780,981
4. Discount rate ... percent	11.2	9.64
5. P. V. of tax shield	....	[1] $200,052

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Development of unit costs—Continued

	Operating expense	Capital investment
6. P. V. of investment less tax shield (L. 3 - L. 5)	$299,618	$580,929
7. 20-year annuity factor	0.127222	0.114587
8. Cost after tax (L. 6 x L. 7)	$38,118	$66,567
9. Cost before tax [L. 8 ÷ (1 - .46)]	----------	123,272
10. Cost per ton (cost ÷ 2,300,000)	.016573	.053597
Total annual cost per ton	.070170	

[1] See calculation following.

Computation of present value of tax shield

End of year	Sum of the years digits depreciation factor	x	Original investment	x	Normalized tax rate	x	Present value factor @ 9.64 percent	=	Present value of yearly depreciation tax shield
1	0.095238	x	$780,981	x	.46	x	0.912076	=	$31,206
2	0.090476	x	780,981	x	.46	x	0.831882	=	27,039
3	0.085714	x	780,981	x	.46	x	0.758740	=	23,364
4	0.080952	x	780,981	x	.46	x	0.692028	=	20,126
5	0.076190	x	780,981	x	.46	x	0.631182	=	17,276
6	0.071429	x	780,981	x	.46	x	0.575686	=	14,773
7	0.066667	x	780,981	x	.46	x	0.525070	=	12,576
8	0.061905	x	780,981	x	.46	x	0.478903	=	10,651
9	0.057143	x	780,981	x	.46	x	0.436796	=	8,967
10	0.052381	x	780,981	x	.46	x	0.398391	=	7,497
11	0.047619	x	780,981	x	.46	x	0.363363	=	6,216
12	0.042857	x	780,981	x	.46	x	0.331415	=	5,103
13	0.038095	x	780,981	x	.46	x	0.302275	=	4,137
14	0.033333	x	780,981	x	.46	x	0.275698	=	3,301
15	0.028571	x	780,981	x	.46	x	0.251458	=	2,581
16	0.023810	x	780,981	x	.46	x	0.229348	=	1,962
17	0.019048	x	780,981	x	.46	x	0.209183	=	1,431
18	0.014286	x	780,981	x	.46	x	0.190791	=	979
19	0.009524	x	780,981	x	.46	x	0.174016	=	595
20	0.004762	x	780,981	x	.46	x	0.158716	=	272
					Present value of tax shield				200,052

Using this same methodology, the restatement of the new fixed plant investment in dollars per ton for Council Bluffs is:

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Movement	*Council Bluffs*
Tons/year	2,300,000
1976	$0.070170
1977	0.145919
1978	0.237833
1979	0.250227
1980	0.150405
1981	0.140893
1982	0.120961

The recalculation of the cost of capital and the depreciation tax shield has necessitated that appendixes B and C in the original decision be changed. The restated appendixes are attached hereto. The return on road property has also been eliminated to avoid any possible "double count" involving the fixed plant investment additive.

Defendant's and protestant's costs, restatement of costs of service for unit-train movements between Belle Ayr, WY, and Council Bluffs, IA, strict cost level (embedded debt level)

Functional area	Defendant's estimate[1]	Protestant's estimate[2]	Restatement[10]
1. Station clerical services	$8.06	$9.29	$7.82
2. Special services	0.43	0	0.42
3. Claims clerical	1.94	2.57	1.87
4. Switching (origin and destination)	6.85	0.70	0.70
5. Gross ton-mile	187.73	206.76	169.91
6. Locomotive unit-mile	53.78	42.25	53.67
7. Crew wages—road[3]	73.08	[6]61.81	65.11
8. Crew wages—yard[4]	4.01		3.72
9. Train mile—other	14.76	14.14	14.72
10. Car inspection	12.56	10.71	12.56
11. Train supplies and expenses	7.85	7.74	7.85
12. Switching—other than unit-train	2.00		1.95
13. Switching—unit-train:			
a. En route switching	0.22	[7]2.20	0.14
b. Intermediate terminal switching	1.73		1.73
14. Car repairs—user responsibility	6.83	6.74	6.83
15. Railroad-owned car charge	0.02	0.02	0.02
16. Helper service—locomotive unit-mile	1.46	[8]3.26	1.46
17. Helper service—crew wages	2.59		2.51
18. Loss and damage	0.72	0.72	0.72
19. Total variable cost[1]:			
a. Per carload	386.62	368.91	353.71
b. Per ton[5]	3.97	3.76	3.57
20. Additional locomotive investment	42.19	14.29	28.14
21. Additional caboose investment	0.28	0.21	0.27
22. Additional maintenance of way	0	0	0

See footnotes at end of table.

Defendant's and protestant's costs, restatement of costs of service for unit-train movements between Belle Ayr, WY, and Council Bluffs, IA, strict cost level (embedded debt level)—Continued

Functional area	Defendant's estimate[1]	Protestant's estimate[2]	Restatement[10]
23. Additional fixed plant investment[9]:			
a. 1976	$7.54	0	$6.95
b. 1977	15.56	0	14.45
c. 1978	25.90	0	23.55
d. 1979	----------------	0	24.78
24. Total variable cost plus additives[1]:			
a. Per carload	478.09	'383.41	451.85
b. Per ton[5]	4.91	3.90	4.56
25. Total fully allocated costs[1]:			
a. Per carload	713.91	XXX	546.49
b. Per ton[5]	7.33	XXX	5.52

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[1] Lines 1-18 based on defendant's "New" appendix JJP-11, page 1, col. (g); lines 20-25 based on revised JJP-9, page 1, col. (f); from data submitted in exhibit H-3 at the oral hearing.

[2] Based on protestant's January 8, 1979, final cost estimate with cost of capital at the embedded interest level.

[3] Restated to reflect acceptance of protestant's Mine-Edgemont crew wage costs and defendant's crew wage costs from Edgemont-Council Bluffs. Also reflects 97 percent variability per Rail Form A.

[4] Reflects acceptance of protestant's crew wage costs from Council Bluffs to the plant and return at 96 percent variability.

[5] Defendant's costs based on 97.43 tons per car. Protestant's costs based on 98.2 tons per car. Restatement based on 99.04 tons per car.

[6] Protestant showed only a combined crew wage cost in exhibit LEP-15.

[7] Protestant developed a figure of $2.20 per carload applicable to *all* BN unit-train and other than unit-train switching.

[8] Protestant developed a figure of $3.26 per carload applicable to *all* helper service.

[9] Figures based on data from the Financial Analysis Branch.

[10] Excludes Return on Road Property. Cost of equipment capital calculated at 16.11 percent before taxes (9.93 percent after taxes) to reflect deferred tax credit.

Defendant's and protestant's costs, restatement of costs of service for coal unit-train movements between Belle Ayr, WY, and Council Bluffs, IA

REVENUE NEED LEVEL

Functional area	Defendant's estimate[1]	Protestant's estimate[2]	Restatement[10]
1. Station clerical services	$8.73	$9.29	$7.82
2. Special services	0.46	0	0.42
3. Claims clerical	2.12	2.57	1.87
4. Switching (origin and destination)	6.87	0.70	0.70
5. Gross ton-mile	238.13	206.76	171.45
6. Locomotive unit-mile	54.09	42.25	53.67
7. Crew wages—road[3]	73.08	[6]61.81	65.11
8. Crew wages—yard[4]	4.01		3.72
9. Train mile—other	14.88	14.14	14.72

See footnotes at end of table.

Defendant's and protestant's costs, restatement of costs of service for coal unit-train movements between Belle Ayr, WY, and Council Bluffs, IA—Continued

REVENUE NEED LEVEL—Continued

Functional area	Defendant's estimate[1]	Protestant's estimate[2]	Restatement[10]
10. Car inspection	$12.56	$10.71	$12.56
11. Train supplies and expenses	7.85	7.74	7.85
12. Switching—other than unit-train	2.18		1.96
13. Switching—unit-train:			
a. En route switching	0.22	[7]2.20	0.14
b. Intermediate terminal switching	1.75		1.73
14. Car repairs—user responsibility	6.83	6.74	6.83
15. Railroad-owned car charge	0.02	0.02	0.02
16. Helper service—locomotive unit-mile	1.60	[8]3.86	1.55
17. Helper service—crew wages	2.59		2.51
18. Loss and damage	0.72	0.72	0.72
19. Total variable cost[1]:			
a. Per carload	438.69	368.91	355.35
b. Per ton[5]	4.50	3.76	3.59
20. Additional locomotive investment	67.87	14.29	28.14
21. Additional caboose investment	1.24	0.21	0.27
22. Additional maintenance of way	13.06	0	0
23. Additional fixed plant investment[9]:			
a. 1976	7.54	0	6.95
b. 1977	15.56	0	14.45
c. 1978	25.90	0	23.55
d. 1979	....	0	24.78
24. Total variable cost plus additives[1]:			
a. Per carload	569.86	383.41	453.49
b. Per ton[5]	5.85	3.90	4.58
25. Total fully allocated costs[1]:			
a. Per carload	882.24	XXX	548.13
b. Per ton[5]	9.06	XXX	5.53

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[1] Lines 1-25 based on defendant's "New" appendix JJP-11, page 2, col. (g); from data submitted in exhibit H-3 at the oral hearing.

[2] Based on protestant's January 8, 1979, final cost estimate with cost of capital at the embedded interest level.

[3] Restated to reflect acceptance of protestant's Mine-Edgemont crew wage costs and defendant's crew wage costs from Edgemont-Council Bluffs. Also reflects 97 percent variability per Rail Form A.

[4] Reflects acceptance of protestant's crew wage costs from Council Bluffs to the plant and return at 96 percent variability.

[5] Defendant's costs based on 97.43 tons per car. Protestant's costs based on 98.2 tons per car. Restatement based on 99.04 tons per car.

[6] Protestant showed only a combined crew wage cost in exhibit LEP-15.

[7] Protestant developed a figure of $2.20 per carload applicable to *all* BN unit-train and other than unit-train switching.

[8] Protestant developed a figure of $3.26 per carload applicable to *all* helper service.

[9] Figures based on data from the Financial Analysis Branch.

[10] Excludes Return on Road Property. Cost of equipment capital calculated at 16.11 percent before taxes (9.93 percent after taxes) to reflect deferred tax credit.

APPENDIX D

31179

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 9199[1]

UNIT TRAIN RATES ON COAL—BURLINGTON NORTHERN, INC.

Decided July 13, 1979

1. In Investigation and Suspension Docket No. 9199 (and related No. 36944):
   a. Burlington Northern proposed rate of $7.38 on unit-train shipments of coal from the Belle Ayr mine near Gillette, WY to Council Bluffs, IA found not reasonable. Maximum reasonable rate of $7.25 prescribed for the future.
   b. Burlington Northern "comeback" rate of $10.82 found not unreasonable.
2. In No. 37021 (and related No. 37029):
   a. Burlington Northern and Chicago and North Western Transportation Company, (BN and CNW), rate of $10.69 on unit-train shipments of coal from Rawhide and Caballo mines near Gillette, WY to Sergeant Bluff, IA found not reasonable. Maximum reasonable rate of $8.23 prescribed for the future and reparation awarded.
   b. Burlington Northern and Chicago and North Western "comeback" rate of $12.32 found not unreasonable.

Alan R. Post and *Curtis H. Berg* for respondent in I. & S. No. 9199 and defendant in No. 36944.

John M. Cleary, Nicholas J. DiMichael, Frederic L. Wood, and *Lynn K. Vorbrich* for Iowa Power and Light Company protestant in I. & S. No. 9199 and complainant in No. 36944.

Alan R. Post, Stuart E. Gassner, and *Curtis H. Berg* for respondents in No. 37021 and defendants in No. 37029.

John M. Cleary, Nicholas J. DiMichael, Frederic L. Wood, and *Gary E. Johnson* for Iowa Public Service Company protestant in No. 37021 and complainant in No. 37029.

DECISION

BY THE COMMISSION:

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[1] Includes No. 37021, *Annual Volume Rates on Coal—Rawhide Junction, WY, to Sergeant Bluff, Iowa,* No. 36944, *Iowa Power and Light Company v. Burlington Northern, Inc.,* and No. 37029, *Iowa Public Service Company v. Burlington Northern, Inc., and Chicago and North Western Transportation Company.*

PROCEDURAL HISTORY

Tariff filings and pleadings.—In I. & S. No. 9199 respondent BN, filed a schedule seeking to establish a rate of \$7.38[1] on unit-train movements of coal from the Amax mine at Belle Ayr, WY, to the Iowa Power and Light Company (IPL) electric power generating station at Council Bluffs, IA. The proposed rate would supplant the existing rate of \$5.23 and was protested by IPL. At the suspension level, prior to the institution of a formal proceeding, IPL stated it would not object if the existing rate were increased from \$5.23 to \$5.62. The Suspension and Fourth Section Board suspended application of the \$7.38 rate (schedule to become effective September 7, 1979) as well as cancellation of the existing \$5.23 rate without prejudice to respondent filing a rate no higher than \$5.62. The latter rate became effective September 15, 1978.

In No. 36944 by complaint filed May 19, 1978, complainant IPL alleges that the \$5.23 rate (now \$5.62) published by BN in its Freight Tariff 280, I.C.C. 496, effective February 1, 1978, on unit-train movements of coal in shipper-owned cars from Belle Ayr to the IPL electric power generating complex at Council Bluffs is a charge which both complainant and defendant BN had agreed to and that upon the contemplated June 30, 1978, expiration date of that charge complainant's unit-train movements would be subject to payment of either the \$7.38 capital incentive rate under consideration in the then pending *Incentive Rate on Coal—Council Bluffs, Iowa,* 359 I.C.C. 201 (1978), or to an even higher per car rate. Complainant requests the Commission find that the just and reasonable rate is one which does not exceed \$5.62 subject to the cost escalation provision which the parties also agreed upon, and to terms and conditions which are just and reasonable. In the event the rate applied by defendant should exceed the sought rate or any rate which the Commission might find to be just and reasonable, then reparation in the amount of such difference is sought.

In No. 37021 respondents BN and CNW published a rate of \$10.69 on unit-train movements of coal in shipper furnished cars from the Carter Oil Company mines at Rawhide and Caballo Junction, WY, to the Neal South Power Station (sometimes referred to as Neal Unit Unit 4) of the Iowa Public Service Company (IPS) at Sergeant Bluff, IA. The rate was protested by IPS and the proposal was ordered into investigation without suspension. Accordingly, the rate went into effect September 15, 1978, subject to investigation.

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[1] Rates are stated in amounts per net ton.

In No. 37029 IPS by complaint filed September 15, 1978, alleges that the unit-train rate of $10.69 published by defendants BN and CNW subject to designated annual volumes, and the rate of $12.32 not subject to an annual minimum volume results in the exaction of unreasonable charges. Complainant seeks prescription of a rate for the future no higher than $6.32, as well as reparation on past shipments in the amount of the difference between the assailed charge and the one sought.

Respondent railroads in I. & S. No. 9199 and No. 37021 filed their opening statements October 23, 1978, as did complainants IPL and IPS in Nos. 36944 and 37029. Protestants IPL and IPS in I. & S. No. 9199 and No. 37021 filed their reply statements on November 27, 1978, as did defendants BN in No. 36944 and both BN and CNW in No. 37029. The argument portion of protestants' reply statements were not prepared until December 7, 1978, and were received at the Commission on December 11 and 12, 1978. Accompanying the statements of argument were petitions for leave to late file the documents. No one opposes the petitions and they are granted. Respondent railroads in I. & S. No. 9199 and No. 37021 filed rebuttal statements on January 8, 1979, as did complainant in No. 36944. Complainant in No. 37029 did not file its rebuttal statement until January 9, 1979. Accompanying the statements was a petition for leave to late file. No one opposes the request and it is granted. Hearing for the purpose of cross-examination was held at Washington, DC, on January 29, 30, and 31, and February 1, 2, and 5, 1979. Briefs were filed by the parties. The Office of Rail Public Counsel was a party in these proceedings, but presented no evidence.

Ex Parte No. 357 increase.—The complainant utilities by a petition filed March 29, 1979, seek to supplement and clarify the record to reflect that the carrier proposed rate of $7.38 to Council Bluffs has been increased through operation of the Ex Parte No. 357 general increase to $8.04 and the $10.69 rate to Sergeant Bluff has been increased by the same means to $11.65. Complainants submit that the increases will require recalculations of the numerous rate to cost ratios included in the record. They point out that the initial Ex Parte No. 357 increase tariff exempted them from the increase but the exemption was removed on short notice and the increase became applicable December 15, 1978, on 1 day's notice.

Respondents in their reply filed April 6, 1979, concede that application of the increases on short notice deprived complainants of their right to protest. They submit however that the request for relief is unnecessary because they will cancel the increase on 30 days' notice, will republish the increase on another 30 days' notice, and collection of the increase with respect to the Sergeant Bluff movement will be waived as soon as a special docket application can be prepared and acted upon by the Commission.

The issue raised by the petition is moot in view of respondents' proposal to cancel the increases and republish on statutory notice and to file a special docket application seeking to refund or waive collection of the excess charges applicable on the Sergeant Bluff movements. The petition will be dismissed.

Workpapers.—On several occasions during the prehearing phase of these proceedings respondent BN expressed the view that workpapers submitted by the parties to the Bureau of Accounts were part of the record. In a letter of January 24, 1979, BN stated that if the workpapers were not then a part of the record, that it be permitted to file an amendment to the modified procedure statements so as to incorporate the workpapers as supplemental exhibits. BN renewed its requests at the hearing and offered to supply copies of the workpapers for submission as exhibits. The complainant utilities opposed the request to have the workpapers treated as evidence.

The Administrative Law Judge reserved ruling but by an order dated February 28, 1979 and served March 16, 1979, held that the workpapers were not a part of the record since they were not submitted as part of any party's evidentiary showing. On appeal of the administrative ruling, division 1 by decision entered June 12, 1979, granted BN's alternate request that the record be opened to incorporate the workpapers. Accordingly, BN and the utility companies were permitted to supplement the record by introduction of their workpapers into evidence.

Consolidating proceedings.—For the purpose of discussion the two proceedings I. & S. No. 9199 and No. 36944 will be considered together because they involve a determination of the proper level of rate on unit-train movements of coal from the Amax mine at Belle Ayr to IPL's generating station at Council Bluffs. For the same reason No. 37021 and No. 37029 will be treated together as both relate to the proper rate level to apply on unit-train movements of coal from the Carter mines at Rawhide and Caballo Junction to Sergeant Bluff.

I. & S. NO. 9199 AND NO. 36944

Factual background.—The rate sought by respondent contemplates movement of coal in shipper furnished cars, a minimum annual volume of 2 million tons, a minimum tender of 105 cars per shipment, an allowance of 4 hours to load and 5 hours to unload, and is subject to ex parte general freight rate increases. BN serves the origin mine and the power station at Council Bluffs and shipments will move in its single-line service a distance of 663.6 miles.

In late 1972, the utility announced plans to construct Unit 3 electric generating plant at its Council Bluffs power station which already contained Units 1 and 2. The new unit was designed to use coal as a power source and was scheduled to be ready to generate power in 1979.

Late the same year (1972) letters were sent to 14 producers of coal with mines in Colorado, Wyoming, Montana, and Utah to explore their interest and ability to supply 2 million tons of low sulphur coal yearly. Proposals were received from seven producers with mines in the four-State area. Based on cost considerations and availability of supply, the choice was narrowed to three producers whose mines were in the area of Gillette, WY, and were served by BN. Of the three only Amax had a producing facility.

On June 15, 1973, IPL and Amax executed a statement of intent that the former would purchase 35 million tons of coal from the producer's reserves near Gillette. Deliveries were to commence in 1978 and move at an average of about 2 million tons yearly. IPL indicated that execution of a contract would be contingent on Amax's aid in negotiating a satisfactory freight rate.

IPL then commenced negotiatons with BN concerning rate levels. On July 10, 1973, BN quoted a unit-train rate at $3.21 in shipper-owned cars. It was contemplated that the rate would apply on trains comprising 110 cars each of 100-ton capacity, that the round trip would require about 73 hours including 4 hours to load and another 4 hours to unload, that in a year's time a set of 110 cars could deliver about 1,250,000 tons of coal, and that the rate would be subject to a price escalation provision which would be invoked July 1 each year with the first increase scheduled to take effect July 1, 1974.

By letter of July 25, 1973, IPL accepted the rate quotation but sought to obtain additional information about the escalation provision. In November 1973, IPL advised BN that a contract had been executed with Amax to supply coal for Council Bluffs. From the latter date until early 1976 the parties had several meetings concerning various aspects of the contemplated movement, but neither side questioned the level of the $3.21 rate. Thus, at a January 30, 1975, meeting BN agreed to have the rate apply on movements comprising 100 cars and annual aggregate movement of 1 million tons. On September 4, 1975, IPL agreed to the BN price escalation formula one of the provisions of which is that if either party suffers gross inequity as the result of unusual economic conditions, an attempt will be made to resolve the difficulty.

On January 7, 1976, BN furnished IPL a copy of the tariff it would file with the Commission. IPL accepted the proffer on February 16, 1976. Subsequently, by an application for special permission dated October 28, 1977, BN sought to published a rate of $5.23 which was the same $3.21 rate the parties had agreed upon in July 1973, but increased according to the escalation formula.

However, on December 2, 1977, the railroad advised that because of several recent coal rate adjustements including those approved by the Commission in formal proceedings as well as rates allowed to become effective without suspension or investigation, the going pattern of rates were higher than the $5.23 rate which the parties had agreed upon and it would therefore not publish the latter rate. BN offered to publish a rate of $6.32 and to hold it to that level until July 1, 1979. Complainant rejected the offer and insisted that BN honor the commitment to the $5.23 rate. On December 23, 1977, BN indicated that having invoked the gross inequity clause of the price escalation formula and IPL having rejected the request for relief, it would file a notice of intent to establish a capital investment incentive rate of $7.38, but pending resolution of that issue it would publish on an interim basis the $5.23 so that shipments of coal could commence to move.

The $5.23 rate was published in BN Tariff No. 280, I.C.C. 496, and became effective February 1, 1978. It carried a cancellation date of June 30, 1978 which was also the contemplated effective date of the capital incentive rate of $7.38. The issue of the lawfulness of the latter rate was considered in *Incentive Rate on Coal—Council Bluffs, Iowa, supra.* By a decision served June 21, 1978, the Commission found that the rate did not qualify for capital incentive rate treatment under 49 U.S.C. 10729. Subsequently the parties made several efforts to negotiate their differences but were unsuccessful, and BN extended the effective date of the $5.23 rate to August 9, 1978. On or about the latter date BN elected to file in its Tariff 290, I.C.C. 541, the same $7.38 rate under the normal statutory notice provisions of 49 U.S.C. 10707 to become effective September 8, 1978, and in the meantime to continue in effect the $5.23 through September 7. The $7.38 rate was suspended in I. & S. No. 9199 but respondent was allowed to establish a rate not higher than $5.62 which was the $5.23 rate increased pursuant to the cost escalation formula. The $5.23 rate remained in effect to September 15 when the $5.62 rate became effective.

In the meantime on July 25, 1974, IPL issued a purchase order for 242 coal gondolas. The purchase was premised on the supposition that the contemplated movement would require two sets of 110 cars each with the balance of 22 cars serving as spares or replacements. The final cost of the purchase was $8,085,202. On August 1, 1977, IPL executed an agreement with a car repair facility located at Alliance, NE, to maintain and repair the cars. From the movement of the first train on February 1, 1978 through September 1978, BN handled 88 unit-train shipments using IPL's two set of cars. In July 1973 the railroad stated that the round trip movement (from the loading of cars at Belle Ayr to deliver and return to Belle Ayr) could be completed in 73 hours. In February 1977, BN indicated that the round trip movement would require 83 hours. However, the average round trip time on the 88 shipments was 134 hours 46 minutes, and because of this the tonnage received in 1978 failed by more than 600,000 tons to cover the company's delivery schedule.

Because of slower than expected turnaround times in 1978, IPL is seeking to lease two additional train sets for a 12-month period beginning December 1978 at a cost of about $2 million. In addition an order has been placed for the purchase of an additional 138 coal cars at a cost of about $5 million. Delivery is expected in January 1980. With the new purchase IPL will have increased its reserve or spare capacity from 10 to 15 percent. Assuming BN's turnaround transit time does not lengthen further, the use of the two company-owned car sets and the two leased sets should enable IPL to recoup its 1978 short fall as well as accept the amount contracted for in 1979. The rebuilding of the spur track at Council Bluffs to accommodate unit-train movements cost the utility $1.3 million.

TARIFF CONDITIONS ASSOCIATED WITH $7.38 RATE

Though the unit-train rate level is the principal issue in dispute, IPL refers to several other matters which it deems important. These include tariff provisions concerning the minimum annual volume to be moved, when loaded cars are "placed" under the tariff, and the minimum number of shipments a year BN must move.

Minimum volume.—The parties agreed sometime about September 1974 that to be entitled to the unit-train rate the utility would have to receive a minimum of 1 million tons yearly and that the unit train must comprise at least 100 cars. IPL objects to the schedule under suspension in that it provides for a minimum yearly receipt of 2 million tons and train consists of 105 cars.

The record indicates that the utility will receive about 2.4 million tons per year for the period 1979-1982 and trains of 105 cars will be required to move the volume of coal which is to be shipped. Accordingly, we find these requirements to be just and reasonable. The tariff under suspension permits up to 5 hours of free time to unload, and contains bunching and frozen coal provisions all of which IPL insists are necessary.

Placement of loaded cars.—Item 145 of the present tariff provides that placement of loaded cars is accomplished when "all cars of the unit train consignment have been placed in position on the consignee's receiving track facility." According to IPL this provision is not clear. The BN demurrage bills indicate that there are multiple points where placement is accomplished. Complainant insists that actual placement should be defined as the point where the first car is placed on the unloading facility ready to be unloaded. Item 145.1 of the assailed tariff contains the substance of the provision sought by IPL.

IPL does not believe the origin of the considered traffic should be limited to the Belle Ayr mine. Future circumstances may make it necessary to supplement the quantities received under the Amax contract and if such purchases are made from producers in the Gillette area, all of which are served by BN, the same rate should apply.

There are a number of large mines in the Gillette area but the record establishes that the transportation circumstances from the mines to Donkey Creek, WY (the latter being the common point for trips to the east and south) are not similar. Because of the differences in terrain we are not persuaded that there is merit in IPL's argument.

Minimum shipments a year.—Item 150(h) of the assailed tariff provides that the minimum annual volume figure of 2 million tons will be adjusted downward in the event BN, because of its disability, is unable to move 190 shipments yearly. The adjustment figure is 10,500 tons for each shipment, under 190, which respondent fails to move. It was the understanding of the parties that two train sets would be required to move the annual volume of traffic, but because of the poor performance by BN in respect to cycle time, IPL has had to provide two additional train sets at considerable expense. The utility argues that the railroad's performance standard of 190 shipments should be adjusted upward to take into account the additional train sets which it has committed to the movement.

The purpose of item 150(h) is to protect the unit-train rate to the utility if BN is unable to move 190 shipments. The evidence indicates that the reason for the lengthy cycle times is construction activity on the various route segments over which the traffic moves. This is a necessary activity if the railroad is to handle efficiently the present and anticipated future volume of coal traffic. It is true the lengthy cycle times have made it necessary for IPL to acquire two additional train sets, but we are not persuaded the public interest would be served by requiring BN to handle instead of 190, 250 or some other number of shipments.

We conclude that the terms and conditions associated with the $7.38 rate are reasonable.

Comeback rates.—Unit-train rate tariffs provide for application of per car rates sometimes referred to as "comeback" rates in the event the movement does not satisfy all the conditions which pertain to a unit-train shipment. The per car rate is $10.82 and is published in item 234 of BN Tariff 219-B, I.C.C. 437. The only direct evidence concerning the "comeback" rate is in the form of a rate comparison submitted by respondent. This evidence shows that the rate produces revenue in mills per ton-mile which compares favorably to that generated by similar rates. Although the complaint assails this rate in general terms, complainant has provided no specific evidence concerning the reasonableness of this rate. Based on this evidence, we find that the "comeback" rate has been shown to be reasonable.

Affect of negotiations with BN on reasonableness of $5.62 rate.—IPL (complainant in No. 36944 and protestant in I. & S. No. 9199) argues that the $5.62 rate it seeks is a rate negotiated with BN in a competitive environment and is therefore at a maximum reasonable level. Because this issue is singular to I. & S. No. 9199 and No. 36944 it will now be considered.

Complainant takes the position that BN's action seeking to establish a rate higher than $5.62 is not of itself contrary to old section 1(6) now 49 U.S.C. 10701 (unreasonable practice) but the violation consists in the reneging on the agreement. The utility concedes that once a contract rate has been filed with the Commission, the agency under its own motion or at the request of either party may determine the reasonableness of the rate. However, failure of BN to honor its commitment, in the absence of Commission action rejecting the agreed rate, is said to be contrary to the policy established by the Commission in Ex Parte No. 358-F, *Change in Policy—Railroad Contract Rates*, served May 9, 1978. The agreement between the parties contains elements of benefit and detriment to each side and in no sense of the term can be considered as a "gentleman's agreement" which can be discarded at the whim of BN.

IPL submits that the rates agreed upon in July 1973 was an important factor in its decision to purchase coal from a producer in the Gillette area. With the signing of the 20-year coal purchase agreement and the apparently successful negotiation of a satisfactory rail rate, IPL was locked to a long-term use of BN service. When by all outward indicia a coal source had been found and a satisfactory rate had been negotiated to move the coal, arrangements were made to purchase a substantial number of coal cars and to construct a line of spur track which would permit the unit train to be unloaded at Unit 3. BN having maneuvered IPL into a long time captive arrangement ought not be allowed to renege on its responsibility.

The power company refers to the decision in *Incentive Rate on Coal—Council Bluffs, Iowa, supra*, where the Commission had under consideration BN's request to establish a rate of $7.38 under the capital incentive provision of 49 U.S.C. 10729. There it was found that the proposal was not qualified for capital incentive treatment on the ground that the purpose of section 10729 was in part to encourage shippers and persons outside the railroad industry to invest in rail related facilities, that IPL had invested several million dollars in rail equipment and facilities in reliance on a BN rate offer, and that for BN to seek to publish a significantly higher rate would defeat the congressional purpose which prompted passage of the section. IPL recognizes that in denying BN's request to treat the $7.38 rate as a capital investment filing the Commission did not pass upon the lawfulness of the level of the proposal, but it submits that failure here to prescribe the $5.62 rate as the maximum reasonable rate would be tantamount to approval of the BN's conduct which was condemned in the earlier proceeding.

Before presenting its defenses, BN urges that this issue should be considered in the context of the following circumstances: in electing not to proceed with publication of the agreed upon rate respondent took into account the desirability of adhering to the agreement with IPL as well as the serious financial condition of the road, and the adverse impact such rate would have on its ability to set other coal rates at levels which would enable it to improve its financial viability so as to be in position to meet further transportation commitments.

Regarding the merits, BN submits that its declared intent in July 1973 to establish a rate of $3.21 and the February 1976 memorandum of understanding which confirmed the earlier statement of intent does not warrant a finding that the $7.38 is unlawful or that any rate higher than $5.62 is in excess of a maximum reasonable level. In support thereof it argues that there are statutory standards which determine the level of rate which a carrier may charge. Title 49 U.S.C. 10701 requires that a rate be reasonable and section 10704(a)(2) sets forth a ratemaking standard by which to measure the reasonableness of a particular level of rate. A rate which is at a level inconsistent with these standards such as the $5.62 rate sought by IPL may not be found to be reasonable. The latter rate is said to be below variable costs on a current cost of capital basis and is well below fully allocated costs (using either the ton/ton-mile or ratio methods) under any of the three cost approaches described by BN's cost expert.

BN maintains that the Commission has declined to enforce private agreements between shippers and carriers relating to transportation charges citing *Hood & Sons* v. *Delaware & Hudson Company*, 17 I.C.C. 15, 18-19 (1909) and *Ormet Corp.* v. *Illinois Central R. Co.*, 341 I.C.C. 647, 648 (1972) because the Interstate Commerce Act has preempted the field.

Finally, BN argues that there are no sound grounds for treating the understanding of the parties as to the rate which would be published as evidence tending to establish the unreasonableness of any higher rate. The January 1976 memorandum of understanding was the reflection of a decision made in July 1973 when economic conditions in the coal industry were vastly different than was the case in 1978. The decision reached in 1973 was made in the context of a depressed coal market and a rule of ratemaking which differs from the economic climate and the present rule of ratemaking. Furthermore, it insists there are no grounds for considering the 1976 understanding as a binding contract. No consideration passed between the parties and nothing in the understanding required that IPL move even a pound of traffic.

The evidence establishes that the parties had an understanding that BN would move the IPL coal from the Amax mine near Gillette to Council Bluffs at a specified rate subject to a cost escalation agreement. Whether this understanding constitutes an enforceable contract is a matter to be determined by a court. Subsequent to the July 1973 understanding, IPL entered into a coal gondola car purchase agreement which involved an outlay of more than $8 million. In addition it undertook construction at a cost of $1.3 million of a spur track to enable the trains to reach the Unit 3 generating station.

It has long been established that a carrier is entitled to initiate rates, and to adopt such policy of ratemaking as it deems wise, subject to the Commission's review powers. *United States* v. *Illinois Central Railroad Company,* 263 U.S. 515, 522 (1924), *Farley Terminal Co. Inc.,* v. *Atchison, Topeka & Santa Fe Rwy. Co.,* 522 F. 2d 1095, 1099 (1975) cert. denied 423 U.S. 997 (1975). We have stated that so long as such voluntarily established rates are reasonable or otherwise lawful, we would not interfere with the carrier's managerial prerogatives. *San Antonio, TX* v. *Burlington Northern, Inc.,* 355 I.C.C. 405 (1976), modified in 359 I.C.C. 1 (1978), see also *Hood & Sons* v. *Delaware & Hudson Company,* 17 I.C.C. 15 (1909).

The Commission acknowledges that this policy places hardships on shippers who must invest large sums of money in reliance on a rate agreement. A recent Commission policy change should help to solve this problem. The Commission has recently changed its policy to allow carriers to file tariffs proposing contract rates, Ex Parte No. 358-F, *Change of Policy Railroad Contract Rates,* served November 9, 1978. Before the shipper has signed a contract with a mine, it may still have bargaining power. This is because more than one railroad may be able to provide the required service. If a shipper has supply options, it should not narrow those options without a binding commitment on rates from the railroad serving that supply point. Supply contracts can be made contingent upon transportation contracts or visa versa.

Unfortunately, the negotiations between these parties occurred before issuance of our policy statement and the carriers have never filed a contract rate tariff for this particular movement. In these circumstances the Commission can only consider whether the proposed rates applied by intermediate application exceed a reasonable maximum.

NOS. 37021 AND 37029

Factual background.—The rate sought by respondents and presently in effect (BN Tariff 291, I.C.C. No. 542) applies on the movement of coal in shipper furnished cars and is conditions on the utility receiving annual volumes of 960,000 tons from September 15, 1978 to August 31, 1979, 1.6 million tons from September 1, 1979 to August 31, 1980, and 1.8 million tons from September 1, 1980 to August 31, 1981, and each succeeding 12-month period, minimum weight of 985 tons per train and 93 tons per car, train consists of 106 cars, and the rate is subject to ex parte general freight rate increases. BN moves the trains from origin to Omaha, NE, a distance of about 653 miles and receives as its portion of the through rate ($10.69) $8.64. CNW moves the train from Omaha to destination a distance of about 101 miles and its share of the through rate is $2.05.

IPS operates an electric generating facility at Sergeant Bluff, a point on the Missouri River a few miles south of Sioux City, IA, and about 100 miles north of Omaha. Until recently three generating units, all coal fired, were operated at Sergeant Bluff. They are designated as Neal Units 1, 2, and 3 and are located in an area of the complex referred to as Neal North. They receive coal from mines in the Dana-Hanna basin of Carbon County, WY, an area in the southern part of the State. This coal moves in the service of Union Pacific to Council Bluffs and CNW beyond to destination. About 1973 planning and construction commenced on a new generating unit to be called Unit 4 and located about a mile south of the existing generators in an area referred to as Neal South. This is also a coal fired unit and will require about 2 million tons yearly.

In 1980 or 1981 (when all four generators are operating at optimum levels) the Neal 1, 2, and 3 units will be receiving about 2.4 million tons of coal moving in the service of Union Pacific and CNW, while Unit 4 will be receiving 1.8 to 2 million tons moving the service of BN and CNW.

In seeking a coal supply source for the new unit IPS considered purchases from mines in the Dana-Hanna area of southern Wyoming where its subsidiary produces coal which is presently burned by Neal Units 1 and 2. As noted this coal moves in the service of Union Pacific from origin to Council Bluffs and CNW beyond to destination. However, because of the heavy burn requirements of the new unit, it was believed that the coal reserves in the described area were not sufficient and it was decided to seek out sources of supply in other areas of Wyoming including the Powder River basin as well as in Colorado. On February 22, 1977, respondents quoted a unit-train rate of $7.96 from the Amax mine at Belle Ayr of which $6 would go to BN and $1.96 to CNW. The rate was subject to an escalation provision effective July 1, 1977, and each July 1 thereafter. With the July 1, 1978 escalation the rate would be $9.50 with BN's share amounting to $7.15. The proffer carried an expiration date of June 15, 1977. IPS considered the tender unreasonable, and the offer was not accepted.

On August 1, 1977, IPS advised respondents that it was going to sign a 5-year purchase contract with the Carter Oil Company (Carter) which operates mines called Rawhide and Caballo in the Powder River basin of northern Wyoming near Gillette. In early February 1978 the parties began to meet in an effort to agree upon a rate and other provisions which would govern the movement. They were able to reach agreement upon a number of issues but could not settle upon a rate, and in due course respondents published the $10.69 rate whose lawfulness is the issue in No. 37021 and No. 37029.

The original coal purchase agreement between IPS and Carter was executed September 29, 1977, and called for purchases from September 1, 1978 through August 31, 1983. Options to terminate permitted IPS to be freed from the contract as early as September 1, 1981. IPS also had an option to extend the contract through August 31, 1998, subject to a series of additional options to terminate.

From the beginning of the regulatory process the limited term of the agreement gave rise to several disputes. First, the shortness of the contract raised a question of whether respondents had market dominance. This issue will be discussed in a subsequent section of the report. Second, the duration of the agreement caused respondents to believe that the capital costs associated with the movement would have to be recovered in 5 years and this is said to have caused the assailed $10.69 rate to be 96 cents higher than would be the case if the coal purchase agreement applied over a 20-year period.

IPS argues that respondents' are trying to force it into a 20-year supply contract, and that this is an infringement on its right to be free of constraint in negotiating the best possible purchase agreement. A 5-year contract affords the utility a certain amount of leverage in negotiating a favorable contract. Respondents demand for a long-term agreement affected IPS's efforts to obtain the best possible price. However, IPS used its option to extend the contract with Carter on November 2, 1978. In view of this respondents proposed to IPS a rate of $9.42, but this is still far above the $6.32 rate fought by the utility.

In discussion with respondents in early 1977 (apparently in connection with the then contemplated movement from the Belle Ayr mine) the parties came to agree that movement to Unit 4 would be in 100-ton cars furnished by IPS, that a train would comprise 100 cars and that the round trip movement could be completed in 4 days or 96 hours with BN accounting for 72 hours and CNW the balance or 24 hours. In October 1977, IPS placed an order for 230 bottom unload gondola cars which would permit formation of two train sets each of 100 cars and a spare margin of 15 percent. In July 1978 BN advised that the cycle time would be 118 hours. To be assured of moving enough tonnage to meet its commitment to the supplier IPS ordered an additional 150 cars. Delivery is expected in the fourth quarter of 1979. Pending delivery, however, a third train set will be leased. The capital cost of the car fleet will exceed $15 million. In addition more than $16 million has been expended in constructing the loop track which serves Unit 4, the unloading facility, thaw shed, and the car shaker.

Shipments commenced moving September 17, 1978. From the latter date through November 18, 1978, there have been 14 shipments comprising an average of 109.07 cars with an average lading of 99.35 tons. IPS concedes that the tariff minimum weight is 93 tons per car, but in view of its experience it believes that the actual load will average at least 98 tons and that this figure should be used in the cost study rather than the 96.65 ton figure used by BN's cost expert. The latter supposedly takes into account the fact that frozen coal adheres to the sides of the cars during the coldest 3 months of the year and is not unloaded.

We conclude that 98 tons is the proper weight to use in determining unit costs. Complainant points out that included in the Unit 4 unloading facility is a thaw shed and a coal shaker constructed at a capital cost exceeding $650,000. These devices have been used successfully during the winter of 1978-79 and all of the coal in the cars has been unloaded.

TARIFF CONDITIONS ASSOCIATED WITH $10.69 RATE

Extension of tariff to all mines in Gillette area.—Though the rate level is the principal issue in controversy, IPS refers to a number of other matters which it considers to be important. It requests that the tariff be modified to provide that the rate prescribed be made to apply from mines in the Gillette area rather than the named Rawhide and Caballo properties. By specifying that the rate applies only from certain origins IPS claims it is precluded from making purchases on the spot market and this is an interference with the free competitive coal market which would otherwise prevail in the origin area. There is evidence that transportation conditions may differ in regard to movements from the mine origins to Donkey Creek and we are, therefore, not persuaded that uniformity of rate treatment is justified from all origins in the Gillette area. As noted below, the supply contract gives IPS flexibility in adjusting the required minimum supply each year. It is not precluded from obtaining higher-priced "spot" market coal if needed.

Number of shipments a year.—Item 150(h) provides in effect that if the railroads are unable to move 1.8 million tons in the stated annual periods then the annual tonnage requirements will be reduced by 9,850 tons for each train under 183 movements that respondents fail to move. IPS submits that during the early negotiations with respondents the parties came to the understanding that two train sets would be required. Because the cycle or turnaround times are substantially in excess of respondents original estimates, IPS found it necessary to acquire a third train set in order to receive the tonnage agreed upon with the mine operator. The utility believes that because it had to commit a third train set to move the volume called for by the contract there should be an upward adjustment in the number of shipments which respondent should move in a year's time.

Respondents point out that the purpose of the rule is to protect the unit train rate in the event they are unable to make the number of trips demanded by the annual required volume.

In effect the utility is asking that the railroads be punished for failing to achieve their initial promised cycle times. We realize that because cycle times are slower than originally anticipated, IPS has incurred substantial additional expenses in leasing a third train set. This, however, does not justify an upward revision of the number of trips or shipments respondents should be called upon to provide. Item 150 is a rule whose purpose is to protect the unit-train rate in cases where respondents are unable to move the volume of traffic and we are not persuaded that the public interest would be served by increasing the minimum number of shipments respondents are to handle in a 12-month period.

We conclude that the terms and conditions associated with the $10.69 rate are reasonable.

Comeback rate.—Unit-train tariffs provide for application of per car rates sometimes referred to as "comeback" rates in the event the movement does not satisfy all the conditions which pertain to the unit-train shipment. The per car rate is $12.32 and is published in item 342 of BN Tariff 219-B, I.C.C. 437. Complainant assails the "comeback" rate but does not accord it special treatment in its proofs. We are not able to find that these rates are unreasonable based on the evidence of record. Furthermore, respondents show that the rate produces revenue in mills per ton-mile which compare favorably to that generated by similar rates. Accordingly, we conclude that the "comeback" rate is reasonable and no further consideration will be given this matter.

ISSUES COMMON TO BOTH THE COUNCIL BLUFFS AND THE SERGEANT BLUFF MOVEMENTS

Market dominance.—Section 10709(c) provides that when a rail carrier proposing or defending a rate has market dominance the Commission then may determine that rate to be unreasonable if it exceeds a reasonable maximum level. Whether or not a carrier or carriers have market dominance presents a threshold issue which must be decided before a determination can be made a particular rate exceeds a reasonable maximum level.

BN alleges that it does not have market dominance and the Commission is without jurisdiction to find the proposed rates of $7.38 to Council Bluffs and the $10.69 to Sergeant Bluff unreasonably high. Complainants submit that the carriers have market dominance.

Though market dominance is an issue in both groups of proceedings, the Suspension and Fourth Section Board was able to determine that there was no effective competition to BN for the Council Bluffs movement. We see no reason to find differently. Apparently, BN is handling not only the requirements of the Unit 3 generator, but also those at Units 1 and 2. The BN has been transporting all of IPL's traffic since February 1978. Prior to that, IPL's coal requirements had moved from southern Wyoming in joint-line service by the Union Pacific and CNW. About that time IPL shifted the UP-served supply to its Des Moines plant. That coal has heating values about 25 percent higher than the BN Powder River basin coal. However, in the face of BN's pricing actions which we condemned in No. 36792, *supra*, as designed to discourage shipper investment in rail capacity, IPL has apparently been unable to arrange for alternative transportation in the face of its present and projected fuel needs. The record indicates that IPL's supply contract is apparently for a 20-year period. BN, therefore, has reasonable assurance of continued traffic, absent evidence of the practical ability to switch to another carrier or mode.

The situation involving Sergeant Bluff is more complex, however. In No. 37021, the board concluded that it lacked evidence to make a determination of market dominance and the parties were directed to submit evidence on this issue pursuant to a timetable designed to enable the Commission to make its finding on market dominance within 90 days. On December 6, 1978, division 1 found that respondents have market dominance over the Sergeant Bluff movement, based on the fact that BN was the only available carrier between the particular Rawhide and Caballo mines named in the tariff, and that no effective geographic competition (from other mines) had been shown.

By an appeal filed January 2, 1979, respondents seek reconsideration of that finding. Respondents urge that they lack market dominance because of geographic competition from origins served by the Union Pacific Railroad Co. In 1970-71 when the coal moved by BN reaches a peak volume, the BN-CNW share of the IPS market (if that market is considered *all* Wyoming coal) will amount to only 42.9 percent while the Union Pacific-CNW share will be 57.1 percent. They point out that until September 1978, BN did not participate in the Sergeant Bluff market[3] and that CNW's 100 percent participation as destination carrier (through joint-line arrangements with Union Pacific on southern Wyoming coal and with BN on northern Wyoming coal) in the Sergeant Bluff market should not be imputed to BN.

Section 10709(a) defines market dominance as an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies. To the extent (if any) that the division's finding rested upon the failure to consider evidence of geographic competition, we cannot agree. Evidence of geographic competition is relevant in rebutting any presumption of market dominance. It tends to show that a shipper does have transportation alternatives.

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[3] The statute requires that market dominance be found within 90 days of the institution of a section 10707 investigation of a new or changed rate if the rate is challenged as unreasonably high. 49 U.S.C. 10709(b). Unless a protestant shows at least a likelihood of market dominance, a rail rate cannot be suspended for this reason, 49 U.S.C. 10707(c)(1). As a practical matter, the Commission extends this rationale to decisions whether or not to investigate. Usually, there is little real difference between the ability to show market dominance, or its likelihood. In most situations, therefore, a finding of market dominance can be made when an investigation is begun (*e.g.*, I. & S. No. 9199). In the rate situations where the full finding must be made under the 90-day rule, the carrier has the burden of showing effective competition. This is because the market dominance question is treated as an integral part of the carrier's showing. See 49 U.S.C. 10707(e).

In No. 37021, we asked for evidence of any clause in the IPS-Carter Coal Co. supply contract which might affect the availability of substitute coal from other sources of supply. In an opening statement filed October 23, 1978, IPS produced an addendum to the basic supply contract. The basic contract[4] contained 21 major clauses, and was executed on the same day (September 29, 1977) as the addendum.[5] The basic contract was for a stated term of 5 years. Clause 2 to that contract provided, however, for possible termination at IPS's sole option effective any time after the third contract year, upon 1 year's notice. The addendum gave IPS 3 years to exercise an option to extend the basic contract until 1998. IPS exercised this option ("the addendum option") on November 2, 1978. The addendum provided for several contract changes if IPS exercised that option. IPS would be unable to use clause 2 to terminate the contract before 5 years. In addition, two clauses[6] would be added, one (clause 20, "Option For Additional Supplies") substantially changed,[7] and one (clause 3, "Quantity") changed in part. Clauses 22 and 3 are pertinent here.

Clause 22 actually contains a series of five options to terminate the basic contract at specific points before 1998. The contract is divided into one 5-year base period, and five 3-year periods. Either Carter or IPS can call for renegotiation of what is termed the "Base for Exhibit A" in the first month of the last year of each base period. In the negotiations at the end of the first two base periods (ending August 21, 1983 and 1987), the supplier has the right of first refusal. If the parties do not agree, IPS must either agree to Carter's last offer or submit a lower "firm written offer which it has received from another supplier." Carter has until 120 days before the end of the base period to decide if it will meet that offer. For negotiations at the end of the third, fourth, or fifth base period, IPS has an absolute right to terminate if agreement is not reached before 120 days from the end of the base period. If it did so, it would again be able to receive up to 2 years requirements at Carter's last best offer.

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[4] This was later introduced into evidence by IPS. See below.

[5] See appendix G for all pertinent contract provisions of record.

[6] Clause 22 ("Price Renegotiation") and clause 23 ("Price Relief For Economic Hardship"). The context of these two clauses was not further indicated in the addendum.

[7] Technically, clause 20 was deleted, but an addition covering the same topic was made specifically by the addendum.

Clause 3 does not obligate IPS to purchase any coal in 1978. It calls for a "base tonnage" of 1.8 million tons in 1979, and 2 million tons per year thereafter[8] (subject to pro rata reduction in any year the contract is terminated). Clause 3.02 shows that IPS may notify Carter yearly of its requirements, but that they cannot be more or less than (an) unspecified percentage(s) of these base tonnages. If IPS does not give notice the base tonnages will apply. The clause indicates that IPS has a minimum purchase requirement of a specific percent of the tonnage called for but the record does not indicate what this figure is.

The reason that the record lacks complete information on the question of geographic competition is the hesitancy of IPS to produce full details of the contract. One possible reason for this is clause 19 of the basic contract. This provides that IPS will make every effort to limit disclosure of the terms of the contract. IPS agreed to treat the contract as Carter's proprietary information. The provision specifies that IPS will make full efforts under applicable law to maintain confidentiality.

The provision is susceptible to different interpretations, some of which are not favorable to IPS.[9] We are not prepared to stand in judgment of the lawfulness of such a provision or the motives behind it at this time. We note that the exercise of this clause has deprived all concerned of certain elements[10] needed to evaluate fully the extent to which IPS is or is not locked into BN service.

To add to the complexity of the situation, the record suggests that IPS may have entered into the contract with the idea of switching to mines operated by a subsidiary at the earliest practicable time. IPS has at least one subsidiary, Energy Development Corp. (EDC), which actively bid for the Neal Unit 4 supply contract. EDC supplies much of the coal for Neal Units 1, 2, and 3, but apparently was unable to secure sufficient uncommitted reserves to meet Unit 4's projected needs.[11] The record indicates that either IPS or EDC has entered into a joint venture with Rocky Mountain Energy Corp. (RME) to mine coal in the Carbon County, WY fields served by UP. BN cites to a statement made by IPS shortly before commencement of this proceeding that the Carter-IPS contract is an interim measure, and that the joint venture with RME is expected to supply Neal Unit 4 after 5 years.[12]

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[8] The addendum permits IPS to change this "base tonnage" to any amount from 1.5 million to 2.5 million tons per year. This requires 4 years notice to Carter, and the base figure cannot be revised again for 5 years after it becomes effective. Of course, IPS would still be able to notify Carter of its yearly requirements under clause 3.02. The addendum's effect is to permit change of the base on which minimum demand, supply, and purchase obligations are computed.

[9] After IPS submitted only the addendum (which, standing alone, looks like an unalterable 20-year commitment if the option to extend is exercised), UP was able to obtain a copy of clause from the Rural Electrification Administration. There is some indication of a continuing FOIA dispute over excess to the entire contract. Parts of the contract were produced in IPS's rebuttal statement, but some key provisions were deleted.

[10] Specifically, these include: (a) IPS's minimum purchase obligations under clause 3 and the contents of any liquidated damages provision; (b) enough detail of the "Base for Exhibit B" to show the extent to which changes in transportation rates are taken into consideration; (c) details of any other contract adjustment formula or provision which is affected by increases in rail transportation costs; (d) details of clause 9 ("Review of Indexes") which are in any way affected by changes in transportation cost; (e) details of clause 10 ("Billings, Payments, and Adjustments") which are in any way affected by changes in transportation cost; and (f) full details of clause 13 ("Right to Terminate Agreement").

The documentary and circumstantial evidence of these matters are susceptible to more than one interpretation. The carriers have market dominance only if one or more of the following is true: (a) the contract provisions are designed to let IPS switch supplies at the earliest possible time, but extraneous factors (*e.g.*, availability of sufficient continguous land to permit alternate mining operations to begin), render the practical ability to exercise that switch speculative; or (b) other evidence (*e.g.*, one or more of the presumptions) is more persuasive; or (c) the inability of the utility to switch in the short run (before the earliest possible contract termination date) leaves it without a defense to short-term price-gouging. A necessary proviso to the last alternative is that what may be abusive pricing if a shipper has no long-run alternative may be reasonable if there is only a short-term fixed commitment.[13] Under the circumstances presented here, a finding of market dominance is warranted. The record indicates IPS's minimum ties to BN of 3 years at the beginning of this proceeding and 5 years now. In addition, consideration must be given to the present uncertainty as to the availability of sufficient noncommitted coal reserves with specifications to meet the Neal Unit 4 generator's boiler design. The high revenue to cost ratios—238.7 percent on this traffic—are discussed elsewhere in the decision.

We give no weight to the arguments of the parties on clause 5 of the base contract. Clause 5 refers to the Rawhide mine but provides that Carter may elect to provide coal from any of its mines if it meets the contract's quality provisions and IPS's ash mineral analysis requirements. The railroads claim that this means that Carter could supply coal from sources not served by BN, thus protecting IPS. We find IPS's argument that the purpose to permit shipments to be delivered from the BN-served Caballo origin named as an origin in the issue unit-train provisions. The clause operates only at Carter's and not IPS's election. It neither tends to show market dominance nor effective competition.

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[11] It is not clear why this happened. One possible contributing factor was the Federal coal leasing moratorium which was in effect from 1971 to June 2, 1979. Sixty-five percent of known coal reserves in the West are on land owned by the Federal Government. Only 5 percent of the Federal reserves have been leased. See Office of Technological Assessment study, "The Direct Use of Coal," at page 21 (March 1979).

[12] See Iowa Public Service Co., First Mortgage Bond Prospectus (August 11, 1978), pages 15-16.

[13] In this proceeding, the carriers argued for amortization of the incremental fixed plant additive over a 5-year period rather than 20 years. As discussed elsewhere in this decision, this involves consideration of the extent to which the additives are likely to benefit other traffic if the IPS movement stops after 5 years.

We are concerned that the problems raised in this proceeding call for further action. Accordingly, we are considering the institution of a proceeding investigating coal supply leasing practices and contracts in the West. This proceeding could examine in detail the types of contractual provisions which characterize the long-term, short-term, and "spot" coal supply markets, and aid in development of guidelines to aid future market dominance determinations and refinement of maximum rate guidelines. In any future increase filed for this movement, IPS is put on notice that it must disclose possible alternative sources of coal and must discuss the terms of any coal supply contract.[14] We note the pendency of another increase on this traffic in I. & S. No. 9212, *Coal, Cabrillo Jct., and Rawhide Jct., WY to Sergeant Bluff, IA*, wherein the questions raised here can be further considered.

Reasonableness of proposed rates measured by rate comparisons.—IPL and IPS seek to establish that the sought rates of $5.62 to Council Bluffs and $6.32 to Sergeant Bluff are at maximum reasonable levels because the revenue in mills per ton-mile which they generate compare favorably with corresponding revenues realized from rates voluntarily negotiated between BN and other shippers.

Complainants' rate comparison study refers to 11 tariffs covering movements from mines in the Powder River basin of northern Wyoming and southeast Montana served by BN to points in Colorado, Wisconsin, Texas, Illinois, Oklahoma, Kansas, and Nebraska. The origin mines in these proceedings are in the Powder

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[14] Other points which must be explained include the relationship between Union Pacific and the joint venture with RME mentioned in the August 11, 1978 prospectus. There is some indication from a recent Department of Energy publication that RME may be a subsidiary or affiliate of UP. See DOE, Office of Coal Supply Development Resource Allocations, "Western Coal Development Monitoring System Survey of Coal Mining Capacity in the West," table 17 (April 1979). The effect of the recent Environmental Protection Agency new sulphur emission standards in New Stationary Source Performance Standards—Electric Utility Steam Generating Units (44 F. R. 33580, June 11, 1979), and the effect of the June 2, 1979 lifting of the Federal coal leasing moratorium on alternative coal supply sources should also be discussed.

River basin. The compared rates apply on movements in shipper furnished cars for distances ranging from 520 to 1,474 miles and with respect to volume of movement, minimum tonnage per train and per car, and loading and unloading periods are similar to the rates under review in these proceedings. The compared rates cover both BN single-line movements and joint-line movements with BN as the originating line and were initially published over a period from June 1973 to April 1978.

The compared rates yielded average revenue of 8.30 miles per ton-mile, as compared with the assailed Council Bluffs and Sergeant Bluff rates of $7.38 and $10.69 which yield 11.2 and 14.2 miles, respectively. If the Council Bluffs and Sergeant Bluff rates were constructed on the basis of the average revenue in mills generated by the compared rates the resulting rates would be $5.51 to Council Bluffs and $6.25 to Sergeant Bluff.

Complainants insist that if rate comparisons are to serve as an appropriate measure of the reasonableness of the rates in issue the former must apply in a transportation environment which is similar to that which pertains to the rates in issue and they must have been established in a competitive environment. They argue that the sought $5.62 rate to Council Bluffs which IPL and BN agreed upon in July 1973 and confirmed to February 1976, was negotiated in a competitive environment, and is a fair measure of the level of the maximum reasonable rate which should be set by this Commission. They claim that the level of the $5.62 competitively negotiated rate for a distance of 663 miles to Council Bluffs establishes that the railroad proposed rate of $10.69 to Sergeant Bluff for a distance of 752 miles is unreasonable in that it greatly exceeds a rate constructed in a competitive environment.

The utilities argue that the more recent western coal rate adjustments which respondents rely upon in support of the reasonableness of the assailed rates they propose are not a proper measure of maximum reasonableness because they were only recently published, were established in a noncompetitive environment, and many are still in litigation.

They also argue that care must be exercised in using recently established rates for comparison purposes because in certain instances shippers may have been induced to agree to rates at a level higher than they would like on the promise that there would be no price escalation of the rate for a specified period. The effect of this sort of bargaining is that it enables the carrier to use the unnaturally high rate for comparison with other rates being assailed and is able to argue that the unnatural rate is part of the prevailing rate structure and a proper measure by which to compare the rate in issue. Finally, complainants repudiate respondents suggestion in No. 37021 and No. 37029 that the assailed $10.69 rate to Sergeant Bluff is justified in part because it is a joint-line movement and CNW's participation is limited to a short distance of about 100 miles.

Defendants concede that some transportation conditions pertaining to the compared rates are similar to those which apply in connection with the unit-train movements here under review. However, excluding the compared rates to Superior, WI, and Metropolis, IL, which entail through movements by water, the balance of the compared rates (with one exception) were negotiated in 1971. All were set prior to the sharp increase in natural gas and fuel oil prices which occurred in 1974 and subsequent years. Prior to 1974 western coal was not a sought after fuel. Oil and natural gas were the preferred forms of energy because of their price and ease of handling. Rail rates established during this period were set under completely different circumstances and therefore ought not be considered as a measure of maximum reasonableness.

Rate comparisons are useful as rough estimates of rate reasonableness but cost evidence takes precedence. This is especially true here where there is no well developed rate structure. Further, the Commission has announced a policy of increased deference to carrier pricing. Thus the carriers will not be required to establish and maintain elaborate and precise rate relationships. In this setting, rate comparisons must be given decreased emphasis in litigated cases.

Reasonableness of proposed rates measured by cost of service.—To demonstrate the reasonableness of the proposed rates, for both the Council Bluffs and the Sergeant Bluff movements, the railroads present cost studies presenting variable and fully allocated costs based on three methods of calculating return to capital invested. The first method employs an 11-percent after-tax cost of capital (19.3 percent on a before-tax basis) as the return on all investments. This method is recommended by the railroads. Using this methodology, the following costs and ratios of rate to variable and fully allocated costs are presented.

Railroads' method (using 11-percent cost of capital)

I. & S. NO. 9199 AND NO. 36944 (COUNCIL BLUFFS MOVEMENT) $7.38 PROPOSED RATE

	Cost	Ratio of rate to cost
		Percent
Variable costs	$5.85	126.2
Fully allocated costs:		
Ton/ton-mile method	9.06	81.5
Ratio method (dollar basis)	7.55	97.7
NOS. 37021 AND 37029 (SERGEANT BLUFF MOVEMENT) $10.69 PROPOSED RATE		
Variable cost	7.35	145.4
Fully allocated cost:		
Ton/ton-mile method	10.74	99.5
Ratio method	9.23	115.8

Using the railroads' methodology, the proposed rate of $7.38 (for the Council Bluffs movement) is less than fully allocated costs determined using the ton/ton-mile method to allocate fixed costs. The proposed rate is approximately equal to fully allocated costs determined using the ratio method to allocate fixed costs.

Similarly, the proposed rate of $10.69 (for the Sergeant Bluff movement) is approximately equal to fully allocated costs determined using the ton/ton-mile method to allocate fixed costs. However, the proposed rate exceeds fully allocated costs using the ratio method to allocate fixed costs.

The second method uses embedded debt rates to determine return on rail investments except those in locomotives and cabooses. For this equipment, the 9.34-percent equipment trust certificate rate was employed. Respondents state that this is the method adopted by the Commission in the reopened proceeding in *San Antonio, Tex.* v. *Burlington Northern, Inc.*, 359 I.C.C. 1 (1978). Using this methodology, the following costs and ratio of rates to costs are presented:

San Antonio method (using embedded debt rates)

I. & S. NO. 9199 AND NO. 36944 (COUNCIL BLUFFS MOVEMENT) $7.38 PROPOSED RATE

	Cost	Ratio of rate to cost
		Percent
Variable cost	$4.91	150.3
Fully allocated cost:		
Ton/ton-mile method	7.33	100.7
Ratio method	6.10	121.0

NOS. 37021 AND 37029 (SERGEANT BLUFF MOVEMENT) $10.69 PROPOSED RATE

	Cost	Ratio of rate to cost
Variable cost	6.28	170.2
Fully allocated cost:		
Ton/ton-mile method	8.93	119.7
Ratio method	7.63	140.1

Using this methodology the proposed rate of $7.38 (for the Council Bluffs movement) is approximately equal to fully allocated cost using the ton/ton-mile method to allocate fixed costs. The proposed rate exceeds fully allocated costs determined using the ratio method to allocate fixed costs.

Similarly, the proposed rate of $10.69 (for the Sergeant Bluff movement) exceeds fully allocated costs determined using either method of allocating fixed costs. The railroads point out that this approach does not reflect the higher cost of equity capital.

The third method employs an 11-percent after-tax cost of capital as the return on all investment, except those in locomotives and cabooses. For this equipment, the 9.34-percent equipment trust certificate rate was employed. Using this methodology, the following costs and ratio of rate to costs are presented:

Adjusted San Antonio method (using 11-percent cost of capital)

I. & S. NO. 9199 AND NO. 36944 (COUNCIL BLUFFS MOVEMENT) $7.38 PROPOSED RATE

	Cost	Ratio of rate to cost
		Percent
Variable cost	$5.67	130.2
Fully allocated cost:		
Ton/ton-mile method	5.88	83.1
Ratio method	7.38	100.0

To demonstrate that the proposed rates exceed reasonable maximums for the service, IPL develops variable costs of $3.62 for the Council Bluffs movement. Similarly, Iowa Public Service Company develops variable costs of $4.16 on the Sergeant Bluff movement. The utilities argue that the rates they propose for the service ($5.62 for the Council Bluffs movement and $6.32 for the Sergeant Bluff movement) cover the railroads variable costs and provide a reasonable contribution to the carriers overhead and profit.

IPL argues that their proposed rate of $5.62 for the Council Bluffs movement provides a coverage of the carriers' variable expenses of $2 per ton or $4.6 million per year from the expected 2.3 million tons to be moved annually by IPL. The proposed $5.62 rate contributes $1.72 to the BN's fixed costs and profits. Application of the contribution to the contemplated yearly movement of 23 million tons will produce some $4 million to BN's net income before taxes. In a year's time the rate proposed by BN will add 6 percent to the level of BN's 1977 net income before taxes.

Similarly, IPS argues that their proposed rate of $6.32 provides a coverage of the variable expenses of $2.16 or more than $3.4 million on the 1.8 million tons to be received in a typical 12-month period. The $6.32 rate provides a $1.86 per ton contribution to the carriers fixed costs. On the annual volume of 1.8 million tons the proposed rate will contribute about $3.34 million to the carriers' net income before taxes.

Minor differences between the parties' cost statements result from different indexing methods and differences between the operating parameters used by the parties. Our resolution of these differences is set forth within appendix A. The most important differences concern the carriers' use of a fixed plant additive, the carriers use of a maintenance-of-way additive, the carriers' amortization of their investment over 5 years, and the carriers' treatment of the cost of capital. We will discuss these differences in detail.

On the basis of experience gained since the late 1960's, respondent has come to learn that unit trains of coal impose extra stress and wear on track and roadbed. To withstand this extra wear, much of the railroads' trackage must be replaced with heavier weight rail and a stronger underlying roadbed. Ordinary traffic does not require such durable track structures. Furthermore, the length and frequency of the unit trains demand longer track sidings. As a result new track sidings must be constructed and existing ones must be lengthened.

The parties are in sharp disagreement concerning the cost treatment of the coal related investment in fixed plant. When a railroad is called upon to handle additional traffic it usually incurs new or incremental investments. The Rail Form A method of estimating costs is to total the new investments required to handle additional traffic and add them to the existing investment base. The investment base is then allocated to the pertinent service units, and the latter are then assigned to the issue traffic. The end figure is an average cost per service unit for the railroad as a whole. Rail Form A procedures allocate a share of extraordinary coal-related costs to all shippers.

The railroads argue that unit coal train traffic alone should bear the cost of building the coal-related durable tracks and roadbeds. To accomplish this, the railroads have taken the incremental fixed plant costs caused by unit coal train traffic and separately allocated these costs to only the unit coal trains. The railroads state that these betterment costs have been excluded from their Rail Form A submissions. Rail Form A inputs, therefore, include only those fixed plant investments necessary to move ordinary traffic. The carriers' resulting cost studies include both a pro rata allocation of Rail Form A roadbed costs and an additive for fixed plant costs caused by unit-coal train traffic.

Complainant utilities insist that the coal related incremental cost additive developed by respondents when added to the Rail Form A traffic related investment causes a double counting of fixed plant investment costs. They urge that the proper procedure is to use either the estimated investment as calculated by the Rail Form A methodology or the actual investment on the route segments over which the traffic moves.

We believe that the use of an additive for fixed plant investments will ensure that the carriers recover their actual costs with more certainty than the use of the unadjusted Rail Form A average amounts. Rail Form A includes the expenses necessary for average traffic. The unit-coal trains, however, require greater fixed plant investments than ordinary traffic. The railroads fixed plant allows the carriers to recover the difference between these larger coal-related investments and system average fixed plant investments. Similarly, a cost study which takes into account only the coal-related investments would not be an accurate estimate because transportation of the coal uses up assets not accounted for by the coal-related investment. It is such traffic related investments which respondents develop through the Rail Form A method. For these reasons the Commission has permitted the case of both adjusted system average costs and a fixed plant additive in recent coal cases. See *Annual Volume Rates on Coal—Flint Creek, AR (Flint Creek)*, 361 I.C.C. 533 (1979).

Complainants also point that while the exclusion of the coal related incremental capital expenditures from the base year operating expense accounts and the investment base, prior to making the Rail Form A calculations, removes a portion of what would otherwise be a double count, "it does nothing with all the other shared systemwide costs of roadway investments which are allocated to IPS's movement by the Rail Form A procedure."

We agree with complainants that, to some extent, the railroads' methodology may include Rail Form A system average investment costs unrelated to this traffic. Although this will overstate costs somewhat, we do not believe it will cause significant overstatements.

Overstatements of cost will not be significant because the railroads' fixed plant additive essentially represents the difference between the larger coal-related investments and system average fixed plant investments. The carriers will still incur average investment costs related to the traffic increase. To some extent the coal-related investments may eliminate the need for some ordinary traffic-related investments. In these instances the carriers' methodology does allocate both a share of system average cost for ordinary traffic-related investments plus a share of the coal-related investments. Because the coal-related investments include such items as extra-long sidings, 132-pound rail and other items only related to coal movements, we believe those instances in which coal-related investments will eliminate the need for traffic-related investments will be few. As a result the potential cost overstatements will be slight.

Respondents state that the coal-related fixed plant investments will not be included in their future Rail Form A inputs. So as to be kept informed on this matter respondents will be required to submit to us their 1977 and subsequent years Rail Form A applications. Also they will be required to submit status reports for the years 1974-1982 of their coal related incremental fixed plant investments. Appendix B describes the content of such reports.

In conclusion we accept respondents procedures for determining fixed plant investment costs associated with the issue traffic. However as explained in appendix A we have adjusted those costs to more accurately reflect the depreciation tax shield.

A second area of dispute concerns whether a maintenance-of-way additive is proper. The railroads maintain that unit coal trains require higher maintenance-of-way costs. They argue that the heavy wheel loads cause greater track wear, resulting in higher maintenance cost.

Complainants argue that Rail Form A considers all levels of railway maintenance and an additional maintenance cost is improper. In fact, complainants argue that maintenance costs should be reduced following the railroads extensive track improvements.

We believe that maintenance costs involve many factors. Without actual studies of maintenance costs it is difficult to determine whether maintenance costs will increase or decrease. It seems likely that in the early years maintenance cost might decrease because of capital improvements to track and roadbed. In later years one might expect higher costs caused by heavier car weights.

Even if it could be shown that in the long run higher maintenance costs will result, it is impossible to determine an appropriate additive. This is because the coal related extra maintenance costs have not been separated and excluded from Rail Form A input.

A third area of dispute concerns whether the investment in coal-related fixed plant additives for the Sergeant Bluff movement should be recovered within 5 or 20 years. We believe the investment in fixed plant additives should be recovered over a 20-year period.

The railroads argue that the investment in fixed plant additive should be recovered within 5 years. This significantly increases the yearly cost of moving the Sergeant Bluff coal during the first 5 years. The railroads admit that the involved assets have a 20-year useful life in coal services. The railroads, however, contend that the utility is only committed to moving coal from the mine served by BN for a 5-year period. They argue that if the carriers do not recover their investment costs within that period, they may never recover these investment costs.

We believe that investment costs should be recovered over the useful life of the involved assets. This is consistent with generally accepted accounting principles.

Let us assume that the railroads were permitted to recover these costs within 5 years, then other shippers could benefit from the remaining useful life of the assets. If these shippers are charged the same 5-year recovery rate, then the carriers could be paid twice for the same investment. If the carriers charge the new shippers a lower rate (without any additive for the paid up investments), then IPS will have paid part of the cost of this new shipper's movement. We have allocated the investment costs over their useful life because that allocates an appropriate share of the investment cost to each shipper.

Based on these and other adjustments to the cost evidence presented by the parties, we have determined variable costs (including additives) of $5.23 for the Council Bluffs movement and $5.91 for the Sergeant Bluff movement.

The utilities argue that the Commission should not depart from its traditional Rail Form A methodology which utilizes only an embedded debt rate to calculate costs. The railroads point out that the 4R Act requires the Commission to consider the revenue needs of the carriers and to prescribe rates which return a fair, reasonable and economic profit.

This Commission has traditionally stated that an allowance for return on investment is not an appropriate consideration in determining the variable costs of service. See *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C. 298 (1970). In recent cases the Commission has pointed out that although that approach may be valid for cost-finding purposes, it does not prevent our consideration of allowances for return on investment for ratemaking purposes. See *Flint Creek, supra*. We, therefore, agree with respondents that section 10704(a)(2) requires the Commission to give due consideration to the revenue needs of railroads in addition to their costs. Accordingly, we have calculated appropriate revenue-need factors.

As indicated in appendix A, we have calculated that 17.9 percent before taxes is the basis for a fair and reasonable return on the railroads' new fixed plant investments. We believe a slightly lower return is fair and reasonable on the old investments represented within Rail Form A costs. The carriers' embedded debt costs and their current cost of equity form the components of this lower cost of capital. Because the railroads made these investments many years ago, they were able to raise debt capital at much lower rates. To allow the railroads returns on these investments based on higher current debt rates would overcompensate the railroads. If the equity-holders, however, do not receive current returns to equity commensurate with the investment risks they bear, railroads will be unable to raise needed equity capital. Using this lower debt rate and the current cost of equity capital, we have calculated that a return of 17.2 percent pretax is fair and reasonable for the investments embedded in Rail Form A costs. This is slightly lower than the new investment cost of capital of 17.9 percent pretax.

Respondents point out that because of the varied economic environment in which they operate it is impossible to recover their fully allocated costs including an adequate return on all the services provided. There is carrier and/or product competition in connection with many of the services held out and carriers are unable to price their services so as to achieve the same rate to cost ratios on all the services offered the public. Because a large portion of railroad costs are fixed as distinguished from variable and because of the competitive environment in which operations are conducted it is impossible to price all services at or above fully allocated costs. As a result some rates must be at levels low enough to retain the business, but yet high enough to make some contribution to fixed costs and to the rate of return. To the extent such a contribution is achieved the burden on other shippers is less.

The Commission has, in the past, recognized the role of differential pricing in railroad ratemaking in general. See Ex Parte No. 338, *Establishment of Adequate Railroad Revenue Levels,* 358 I.C.C. 844, 853-54 (1978). Nevertheless, the railroads should not be allowed to make up their entire shortfall by extracting monopoly profits from captive shippers.

In the recent decision in *Flint Creek, supra,* the Commission established a limit on rates to prevent unfairness to individual shippers and distortions in the economy. In that decision we determined that before the Commission could impose a substantial burden on some shippers, the railroads must show more than revenue need on a system basis. The Commission needs the following additional data, including (1) specific identification of the traffic that must be subsidized by other traffic and the reason why rates cannot be increased on that traffic; (2) the extent to which the railroads provide service on unprofitable branch lines and the reason(s) why such service cannot be made profitable or abandoned; (3) identification of commodities other than coal which could also make substantial contributions to the railroads' system revenue needs; and (4) identification and quantification of excess capacity on a carrier's system.

A related consideration here is our policy to encourage innovative and aggressive marketing and pricing policies on competitive traffic. The railroads need to take a hard look at cost of service and either weed out the traffic which is noncompensatory or else raise rates where possible. Until a railroad has shown that it is unable to increase revenue on its competitive traffic, we will be reluctant to approve or prescribe rates which have significantly higher than fully allocated cost (at the revenue need level) on traffic such as that involved here.

The railroads involved in this proceeding have not achieved revenue adequacy.[15] Thus, some increment above fully allocated cost is desirable and logical on traffic involved here.

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[15] In Ex Parte No. 353, *supra,* we determined that, on a national basis, the railroads have a cost of capital for revenue adequacy purposes of 10.6 percent. Both BN and KCS earn returns on net investment lower than 10.6 percent. BN's return on net railway investment (pretax) for the years 1975-1977 was 2.30, 2.58, and 2.29 percent, respectively. Over the last 6 years, CNW has averaged only a 4.86-percent return (pretax) on invested capital.

In our *Flint Creek* decision, we determined that a rate set at 7 percent above fully allocated cost (calculated at the revenue need level) is reasonable as an interim limit for captive traffic's contributions to system revenue need.

Based on this 7-percent increment we find that a rate not exceeding $7.25 is reasonable for the Council Bluffs movement and a rate not exceeding $8.23 is reasonable for the Sergeant Bluff movement.

Pending the formulation of more precise standards in Ex Parte No. 347, *Western Coal Investigation—Guidelines for Railroad Rate Structure*, notice of proposed rulemaking served May 17, 1978, we believe a 7-percent increment is warranted in this case. As indicated above, carriers which believe this increment is inadequate may introduce evidence concerning their attempts to increase revenue on competitive traffic by modern cost finding, aggressive and innovative marketing techniques, and pricing policies. An anlaysis of the carriers traffic mix will be required. Evidence submitted in the yearly revenue need proceedings will also be considered.

ENVIRONMENTAL AND ENERGY IMPACT

The present unit-train coal movement does not affect the quality of the human environment. The cumulative impact of the western coal rate structure will be considered in Ex Parte No. 347, *supra*. The record contains no evidence demonstrating adverse environmental impacts from these movements. This decision is not a major regulatory action under the Energy Policy and Conservation Act of 1975.

ULTIMATE FINDINGS

Upon consideration of the record we find:

A. In I. & S. No. 9199 and No. 36944 that:

(1) Respondent Burlington Northern has market dominance;

(2) Respondent has not shown the proposed rate of $7.38 on unit-train movements of coal from the Belle Ayr mine near Gillette, WY to Council Bluffs, IA to be reasonable, but terms and conditions associated with application of the rejected rate found shown to be reasonable;

(3) Reasonable maximum rate for the future found to be $7.25 subject to reasonable terms and conditions; and

(4) The $10.82 "comeback" rate published in item 234 of BN Tariff 219-B, I.C.C. 437, on shipments of coal from the Belle Ayr mine near Gillette, WY to Council Bluffs, IA found shown to be reasonable.

B. In No. 37021 and No. 37029 that:

(1) Respondents Burlington Northern and Chicago and North Western have market dominance;

(2) Respondents have not shown the proposed rate of $10.69 on unit-train shipments of coal from the Rawhide and Caballo mines near Gillette, WY to Sergeant Bluff, IA to be reasonable, but terms and conditions associated with application of the rejected rate found shown to be reasonable;

(3) Reasonable maximum rate found to be $8.23 subject to reasonable terms and conditions;

(4) Complainant Iowa Public Service Company paid and bore freight charges based on the $10.69 rate and has been damaged to the extent that rate exceeded a maximum reasonable level herein determined to be $8.23 and is entitled to reparation plus interest in the manner provided for in 49 U.S.C. 10707(d); and

(5) The $12.32 "comeback" rate published in item 342 of BN Tariff 219-B, I.C.C. 437, on shipments of coal from the Rawhide and Caballo mines near Gillette, WY to Sergeant Bluff, IA found shown to be reasonable.

C. In all four proceedings that:

(1) The petition of complianant utilities to supplement and clarify the record is moot and will be dismissed; and

(2) This decision does not significantly affect the quality of the human environment and is not a major regulatory action under the Energy Policy and Conservation Act of 1975.

COMMISSIONER GRESHAM, dissenting:

I do not share the majority's view that a rate set at 7 percent above fully allocated cost (calculated at the revenue need level) is at the maximum reasonable level. My position on this matter has been separately expressed in *Annual Volume Rates on Coal—Flint Creek, AR,* 361 I.C.C. 533 (1979) and *San Antonio, TX* v. *Burlington Northern, Inc.*, 361 I.C.C. 482 (1979).

COMMISSIONER CHRISTIAN, dissenting:

I agree with the majority's conclusion that the rate of $10.69 proposed by the railroads has not been shown to be just and reasonable. However, I cannot agree with the $8.23 rate prescribed by the majority as the maximum reasonable level. In my opinion, the maximum reasonable rate for the instant movement is $9.73. I base this conclusion on two areas of disagreement with the majority decision—one, a disagreement as to the proper resolution of a major cost issue; and the other, a disagreement as to the proper implementation of the concept of differential pricing.

I will turn first to the cost issue. I have no quarrel with the majority's treatment of variable costs. However, when we turn to the treatment of capital costs, the critical issue is the time period within which the railroads should be permitted to recoup these costs. The majority has concluded that 20-year recoupment period is appropriate, apparently in the belief that the shipper is locked into its supply contract for a period of 20 years. However, I do not believe this is a correct interpretation of the contract. In my opinion, under clause 22 of the contract, IPS is in fact bound to its current energy source only for a period of 5 years, with five additional 3-year options for extension which may or may not be executed. In these circumstances, I believe the railroads' use of a 5-year period for apportionment of its capital costs is entirely proper, since there is no certainty that the coal movement will continue to exist after the initial 5-year period. If a 5-year period, rather than a 20-year period, is used, it will result in adding approximately 42 cents to the rate at the revenue need level.

The computation of this 42-cent figure is admittedly based upon a "worst-case" basis—i.e., the assumption that none of the capital costs would be recouped through other traffic if the IPS contract were terminated after 5 years. And I recognize that it is at least possible that some recovery from other traffic might in fact occur. However, in my opinion, it is appropriate to use a worst-case assumption for the purpose of this decision. We must bear in mind that we are engaged in the prescription of a *maximum* reasonable rate—not the precise rate which the Commission itself might have chosen as a matter of judgment, but the level beyond which the railroad will not be permitted in *its* judgment to raise the rate. For this purpose, I believe we must give the railroads the discretion to decide whether or not to take the chance that some of this cost might be recovered beyond the 5-year period, either from IPS or from some other shipper. Its decision to apportion recovery of those capital costs over the 5-year period was, in my opinion, a decision that is well within its discretion to make.

Beyond this specific cost issue, I also disagree with the majority's conclusion that the maximum reasonable level for the instant rate is 7 percent above fully allocated costs. See my dissent in *Annual Volume Rates on Coal—Flint Creek, AR*, 361 I.C.C. 533 (1979). The basic issue here is the degree of rate flexibility above the revenue need level which is warranted in a case such as this. And a determination of that issue essentially concerns the issue of whether, and to what extent, the railroad industry should be permitted to engage in differential pricing in its rate decisions.

Under the 4R Act, this Commission is directed to assist the railroads in achieving revenue adequacy (49 U.S.C. 10704(a)(2)). We have previously concluded that revenue adequacy requires an overall rate of return of at least 10.6 percent. We have also concluded that, if the railroads are ever to achieve revenue adequacy, they must be permitted to engage in differential pricing. See *Establishment of Adequate Railroad Revenue Levels*, 358 I.C.C. 844 (1978).

Although the majority gives lip service to those principles here, the 7 percent ceiling imposed is, in my opinion, so low as to make a mockery of the entire concept of differential pricing. The simple fact is that, for competitive reasons, the railroads are compelled to keep many of their rates well below fully allocated costs. As long as those rates are above variable costs, the traffic makes at least some contribution to fixed costs and thus should not be discouraged. But the existence of these competitive rates makes it imperative that other rates be set at a sufficiently high level to yield an overall return at an adequate level. This does not, of course, mean that the railroad should be permitted to gouge captive shippers. It does, however, mean that rates substantially in excess of 7 percent above the revenue need level must be allowed.

I then come to the final and most difficult question—whether the $10.69 rate proposed by the railroads is within or without the outer boundary of maximum reasonableness. Under my computation of costs, the proposed rate is 32 percent above fully allocated costs at the revenue need level. While not so exorbitant as to shock the conscience, this is substantially higher than the return generally prevailing on comparable traffic, and higher than any level approved by the Commission in recent years. Although the issue is certainly not free from doubt, it is my judgment that this does exceed a maximum reasonable level.

In the absence of an established standard for judging maximum reasonableness, the precise line to be drawn is necessarily a matter of judgment. At this juncture, I believe the best guide available is the rate level presently in effect, and approved by the Commission, with respect to other western coal movements. In other recent cases, we have approved rates at a level as much as 20 percent above fully allocated costs at the revenue need level. See *Incentive Rate on Coal—Hayden, CO, to Kings Mill, TX*, 359 I.C.C. 749 (1979); *Incentive Rate on Coal—Smithers Lake, TX*, 358 I.C.C. 537 (1977), affirmed *Houston Lighting and Power Co.* v. *United States*, No. 77-2070 (D.C. Cir. 1979); and *Incentive Rate on Coal—Cochise, Arizona*, 357 I.C.C. 683 (1977), affirmed *sub nom., Arizona Electric Power Cooperative, Inc.* v. *United States*, No. 77-2071 (D.C. Cir.

1979). If the 20-percent standard is used, it results in a rate of $9.73 per ton—a rate which, coincidentially, closely approximates the "last offer" made by the railroads to IPS immediately prior to the commencement of this litigation. Since a 20-percent additive would bring the rate to a level which is rationally related to our previously announced standards and the carriers' reasonable expectations, I believe it is a reasonable standard to employ at the present time, pending the development of a more precise standard on the basis of a more complete record. I would thus permit the railroads, at this juncture, to establish a rate which is 20 percent above fully allocated costs as the revenue need level, and would prescribe a rate of $9.73 for this movement.

It is ordered:

(1) That respondent Burlington Northern, Inc., in I. & S. No. 9199 and respondents Burlington Northern, Inc., and Chicago and North Western Transportation Company in No. 37021 establish on or before 30 days from the date of service of this decision, upon not less than 5 days' notice to the Commission and the general public by filing and posting in the manner prescribed in 49 U.S.C. 10762 and thereafter maintain and apply reasonable maximum rates of $7.25 per net ton to Council Bluffs, IA and $8.23 per net ton to Sergeant Bluff, IA subject to terms and conditions as are found reasonable in this report;

(2) That concurrent with the publication and effective date of the rates described in (1) above, respondent Burlington Northern, Inc., in I. & S. No. 9199 cancel the rate of $7.38 on unit-train movements of coal from the Belle Ayr mine near Gillette, WY to Council Bluffs, IA, and respondents Burlington Northern, Inc., and Chicago and North Western Transportation Company in No. 37021 cancel the $10.69 rate on unit-train movements of coal from the Rawhide and Caballo mines near Gillette, WY to Sergeant Bluff, IA;

(3) That Iowa Public Service Company complainant in No. 37029 comply with 49 CFR 1100.95;

(4) That the complainant utilities petition to supplement and clarify the record be dismissed;

(5) Petitions are due 20 days following service of this report;

(6) Respondents must submit their 1977 and 1978 Rail Form A applications within 30 days from the service date of this report. The 1979 Rail Form A applications should be submitted by March 1, 1980. Similarly, future Rail Form A applications should be submitted by March 1 of the succeeding year. Respondents should

also submit status reports as described in appendix B within 6 months from the service date of this report;

(7) If respondents wish to justify their proposed rate they may submit additional revenue need information such as described in this report. Such information should be provided within 45 days of the service date of this decision;

(8) Parties in opposition to this proposed rate may respond within 30 days thereafter;

(9) Respondents may submit their reply within 20 days thereafter; and

(10) This proceeding is dismissed without prejudice to possible reopening based upon our findings in Ex Parte No. 347, *Western Coal Investigation—Guidelines for Railroad Rate Structure*, Ex Parte No. 353, *Adequacy of Railroad Revenue (1978 Determination)*, or Ex Parte No. 355, *Cost Standards for Railroad Rates*.

By the Commission, Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp and Christian. Commissioners Gresham and Christian dissenting.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

[appendices omitted]

INTERSTATE COMMERCE COMMISSION

DECISION

INVESTIGATION AND SUSPENSION

DOCKET NO. 9199[1]

UNIT TRAIN RATES ON COAL—BURLINGTON NORTHERN, INC.

DECIDED July 6, 1977

In I. & S. No. 9199 respondent Burlington Northern, Inc. filed a schedule seeking to establish a rate of $7.38 per net ton on unit train movements of coal from the Amax mine at Belle Ayr, WY, to the Iowa Power and Light Company (IPL) electric generating station at Council Bluffs, IA. The Suspension and Fourth Section Board suspended application of the $7.38 rate without prejudice to filing a rate no higher than $5.62 per net ton. In No. 36944, Complainant (IPL) seeks prescription of a maximum reasonable rate.

Upon consideration of the record, including the extensive cost evidence and rate comparisons submitted by the parties, we find as follows:

(1) Respondent Burlington Northern has market dominance;

(2) The proposed rate of $7.38 on unit train movements of coal from the Belle Ayr mine to Council Bluffs, IA found not reasonable, but terms and conditions associated with application of the rejected rate found reasonable;

(3) Reasonable maximum rate for the future found to be $7.25 subject to reasonable terms and conditions;

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[1] Including No. 36944, *Iowa Power and Light Company* v. *Burlington Northern, Inc.*

(4) The $10.82 "comeback" rate published in item 234 of BN Tariff 219-B, I.C.C. 437, on shipments of coal from the Belle Ayr mine to Council Bluffs, IA found reasonable.

(5) The petition of complainant utilities to supplement and clarify the record is moot and will be dismissed.

(6) This decision does not significantly affect the quality of the human environment and is not a major regulatory action under the Energy Policy and Conservation Act of 1975.

This is a final decision within the meaning of 49 U.S.C. § 10707. A complete discussion of this decision will be issued with related decisions next week.

It is ordered:

(1) That respondent Burlington Northern, Inc., in I&S No. 9199 establish on or before 15 days from the date of service of this decision, upon not less than 10 days notice to the Commission and the general public by filing and posting in the manner prescribed in 49 U.S.C. § 10762 and thereafter maintain and apply a reasonable maximum rate of $7.25 per net ton to Council Bluffs, IA.

(2) That concurrent with the publication and effective date of the rates described in (1) above, respondent Burlington Northern, Inc., in I&S No. 9199 cancel the rate of $7.38 on unit train movements of coal from the Belle Ayr mine near Gillette, WY to Council Bluffs, IA.

(3) The complainant utilities petition to supplement and clarify the record is dismissed.

By the Commission. Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp and Christian. Commissioner Stafford absent and not participating. Commissioners Gresham and Christian dissenting.

H. G. HOMME, JR.
Secretary

(SEAL)

COMMISSIONER GRESHAM, dissenting:

I would find the suspended $7.38 rate to be just and reasonable under the standards applied in prior western coal cases. My position on this matter has been separately expressed in No. 36970, et al., *Annual Volume Rates on Coal—Wyoming to Flint Creek, Arkansas,* ICC , (decision served May 25, 1979) and No. 36180, et al., *San Antonio, TX, Public Service Board* v. *Burlington Northern,* ICC , (decision served June 1, 1979). See also *Houston Lighting & Power Co.* v. *ICC,* F.2d (D.C. Cir., 1979), No. 77-2070, et al., decided June 26, 1979, slip opinion, at 27–28. In that proceeding, the reviewing court upheld the Commission's finding that two unit-train coal rates, recovering 163 percent and 159 percent of variable costs and 121 percent and 124 percent of fully-allocated costs respectively, were within the zone of reasonableness.

Finally, I do not believe that this abbreviated notice qualifies as a "final decision" within the meaning of 49 U.S.C. 10707(b)(1). As a result, the suspended rate becomes effective today.

COMMISSIONER CHRISTIAN, dissenting:

I would find the rate proposed by respondents to be just and reasonable under the standards we have applied in previous western coal cases. My reasons for rejecting the majority's "7 percent solution" are set out in detail in my dissent to No. 36970, *Annual Volume Rates on Coal—Wyoming to Flint Creek Arkansas,* (decided May 21, 1979).

APPENDIX E

IN THE
United States District Court
Southern District of Iowa
Central Division

IOWA POWER AND LIGHT COMPANY, a corporation, *Plaintiff,* *v.*	CIVIL NO. 79-296-D
BURLINGTON NORTHERN, INC., a corporation, *Defendant.*	RULING AND ORDERS

On July 19, 1979, the undersigned Judge heard plaintiff's application for preliminary injunction. Final briefs were submitted on July 25.

This suit was commenced in the Iowa District Court in and for Polk County on July 3, 1979, on which date a judge of that court issued an ex parte temporary injunction restraining and enjoining defendant "from doing any act, whether by putting into effect any supplement or amendment to its tariffs including I.C.C. Tariff BN 4184 or otherwise, that would result in an applicable rate different than that specified in the January 7, 1976 letter of understanding set forth as Exhibit 4 to plaintiff's Petition or that would increase the rates above those contained in the agreement of the parties and the escalations contained therein until such time as there is an adjudication of the matters raised in said Petition." Bond was set in the amount of $375,000, which was filed by plaintiff.

On July 6, defendant removed the case to this Court.

On July 13 the parties filed a stipulation pursuant to which this Court entered, on the same date, the following order:

> IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that the temporary injunction entered against the Defendants on July 3, 1979 in the District Court of Iowa in and for Polk County is now considered a temporary restraining order before this Court and is extended until such time as the question of the granting of a preliminary injunction is heard by this Court.
>
> IT IS FURTHER ORDERED ADJUDGED AND DECREED, that the question of the granting of a preliminary injunction is set for hearing on the 19 day of July, 1979 at 9:30 o'clock a.m.
>
> IT IS FURTHER ORDERED ADJUDGED AND DECREED, that the provisions of Rule 65(c), Federal Rules of Civil Procedure, are satisfied until the date of said hearing by the bond currently on file in the Iowa District Court in and for Polk County and that the Plaintiff will not be required to file or produce further security in support of its cause of action before this Court before the date of the hearing on the preliminary injunction.

At the July 19, 1979, hearing, it was agreed by counsel and ordered by the Court that the temporary restraining order be extended until the Court ruled on plaintiff's request for a preliminary injunction.

Plaintiff, Iowa Power and Light Company (Iowa Power) is an Iowa corporation engaged in the business of generating, transmitting, distributing and selling electric energy and distributing and selling natural gas in Iowa. Iowa Power is a regulated public utility which supplies electricity to 119 incorporated communities and many rural areas located in 26 counties of Iowa having an area of 5600 square miles and a population of 500,000. At December 31, 1978, Iowa Power had 224,100 electric customers.

Defendant, Burlington Northern, Inc. (BN) is a common carrier by railroad incorporated in the state of Delaware. BN has been duly authorized to transact business in Iowa as a foreign corporation. The defendant is engaged in the transportation of bituminous steam coal between points in the state of Wyoming and points in the state of Iowa including the destination of Council Bluffs, Iowa.

Council Bluffs Power Station Unit No. 3, located at Council Bluffs, Iowa, is jointly owned by the plaintiff and Iowa-Illinois Gas and Electric Company, Central Iowa Power Cooperative, Corn Belt Power Cooperative, Inc., Eastern Iowa Light and Power Cooperative, Inc., Cedar Falls Municipal Electric Utility, and Atlantic Board of Waterworks and Electric Light and Power Plant Trustees. Under an agreement between the joint owners, Iowa Power has full responsibility for constructing and operating the plant, including arranging for the purchase and transportation of its fuel supply.

In order to secure the delivery of coal to the Council Bluffs Unit No. 3, Iowa Power sought proposals and began negotiations for the purchase of coal from companies offering coal from Colorado, Montana, Utah and Wyoming. As a result of these negotiations a letter of intent dated June 15, 1973, between AMAX Coal Company and Iowa Power was agreed to for the purchase of 40 million tons of coal over 20 years starting in 1978 in annual quantities in excess of 2 million tons in the first 10 years and somewhat less during the last 10 years with a formal contract being contingent upon the securing of a satisfactory freight rate.

Iowa Power then turned to negotiations with the BN for the establishment of a satisfactory freight rate. At a meeting on June 26, 1973, the BN made an oral offer of a rate, subject to escalation, of $3.81 per ton in BN cars or $3.21 per ton in shipper-owned cars. The BN reduced this oral offer to writing in a letter of July 10, 1973 (Exhibit 1 to the Petition). On July 25, 1973, Iowa

Power accepted, in writing, the offer set forth in the letter of July 10, 1973 (Petition, Exhibit 2). These communications called for the establishment of a freight rate to be published and a tariff to be filed with the Interstate Commerce Commission for the transportation of coal from the Belle Ayr mine of the AMAX Coal Company at Belle Ayr, Wyoming, to Council Bluffs at a rate of $3.81 a ton in BN cars or $3.21 per ton in Iowa Power cars subject to annual escalation. They also provided that shipments would be handled by the BN direct with the coal movement to continue for approximately 20 years. The understanding was further reduced to writing in a proposed letter of understanding, as well as a proposed tariff, on September 12, 1974 (Petition, Exhibit 3), which letter of understanding, in its revised and final form was transmitted by the BN on January 7, 1976, and accepted on February 16, 1976 (Petition, Exhibit 4). In accordance with the escalation portion of the letter, the rate as of January 1976 had increased to $4.14 in shipper-owned cars.

Pursuant to the communications the parties understood that the unit train tariff would be escalated in accordance with the BN standard escalation formula (Petition, Exhibit 4, p. 12) subject to the condition that:

> If [either] party should suffer a gross inequity as a result of unusual economic conditions, which result in the formula failing to fairly cover cost increases, such inequities will be resolved by mutual agreement between BN and the shipper. Pending such agreement, neither party shall be relieved of its obligation as outlined in the current effective tariff and regular escalation shall continue using the above formula in the interim.

Iowa Power then entered into a coal supply agreement with AMAX Coal Company for the delivery of 40 million tons of low sulphur Wyoming coal to Council Bluffs, Iowa, during the period 1978 to December 31, 1997. This coal is and will be shipped from AMAX mines located on the defendant's lines in Wyoming.

Iowa Power also did the following things and expended the indicated sums:

(1) Constructed Unit No. 3 at Council Bluffs station at a cost of approximately $275,000,000.

(2) Rebuilt the spur track at Council Bluffs to BN's specifications at a cost of $1,300,000.

(3) Purchased 242 rotary dump coal cars presently in service at a cost of approximately $8 million.

(4) Entered a contract ordering 138 more rotary dump cars for January 1980 delivery at an additional cost of approximately $5 million.

Iowa Power has shipped coal from Belle Ayr, Wyoming, to Council Bluffs, Iowa, via the defendant, BN, in an amount totalling 1,400,748.29 tons in 1978 and 1,032,214.84 tons through June 1979. Iowa Power has paid to the defendant BN $7,527,164.94 in 1978 and $5,801,047.40 for the transportation performed through June 1979. Substantial shipments were also made in July.

Effective February 1, 1978, in Freight Tariff 280, ICC No. 496 (subsequently renumbered ICC BN 4184) the BN did publish the agreed rate, as escalated, of $5.23 per net ton. Pursuant to the understanding, the rate was escalated to $5.62 in September 1978 and effective July, 1979, was again escalated to $6.00 per net ton. However, Supplement 14 to Tariff ICC BN 4184 would have made that rate expire with July 6, 1979, and BN Tariff 290, ICC 541 (subsequently renumbered ICC BN 4187) would have increased the rate to $7.38. The expiration of the agreed rate and its replacement with a $7.38 rate was originally to be with September 6, 1978, but that publication was prevented from becoming effective by the Order of the Interstate Commerce Commission in Investigation and Suspension Docket No. 9199, *Unit-Train Rate on Coal—Burlington Northern, Inc.* (decided

September 1, 1978), with the suspension period being extended to and including July 6, 1979, by subsequent Order of the I.C.C. decided March 13, 1979.

Because the matter before the Court is a request for a preliminary injunction, the burden rests with the plaintiff to demonstrate either: (1) that it will probably succeed on the merits and that it will suffer irreparable harm if preliminary relief is not granted, or (2) that there are serious questions going to the merits and that the equities decidedly favor the plaintiff. *Fennell v. Butler*, 570 F.2d 263, 264 (8th Cir. 1978).

The most closely analogous case which either party has cited, *Farley Terminal Co. v. The Atchison, Topeka & Santa Fe Ry.*, 522 F.2d 1095 (9th Cir. 1975), held:

> Where, as here, a conflict exists between published tariff rates and rates enumerated in pre-existing agreements, we think it well established that the tariff rates must prevail. Were we to permit enforcement of the inconsistent contractual rates, we would significantly undercut the clear policy of the Act to secure equal rates for all, as well as condone one discriminatory situation such as the Act was intended to remedy ***.
>
> In this connection, a tariff, rate, or charge, duly established in accordance with the Act, is the legal rate; it has the force of statute and is binding on carrier and shipper alike * * *. And a contract valid when made is nevertheless rendered void by subsequently established tariff rates which are inconsistent, at least to the extent of the inconsistency * * *. Moreover, a shipper's knowledge of duly published tariff provisions is presumed * * *.
>
> Appellants' remaining contention—that the Santa Fe was required under the circumstances to establish a tariff rate identical to that enumerated in its pre-existing agreements with appellants—is without merit. It is well settled that a carrier is entitled to initiate rates, and to adopt such policy of rate-making as it deems wise, subject to the revisory powers

> conferred upon the ICC * * *. And in light of the congressional intention, already noted, that pre-existing agreements be abrogated by subsequently promulgated regulations, at least to the extent of the inconsistency, we think it clear that a carrier's decision fixing a proposed tariff rate to be charged uniformly to all should not be foreclosed by its pre-existing obligation to charge a different rate to a few.

Id. at 1098–99.

Farley suggests that the carrier is free to alter its rates as it chooses, subject to ICC revision. Language in other cases supports that view. *United States v. Illinois Central R.R.*, 263 U.S. 515, 522 (1924). It may be that, as *Farley* suggests, shippers deal at their peril with carriers and are presumed to know not only the legal tariff but also that carriers may change those tariffs at will.

Plaintiff has failed to meet its burden under *Fennell v. Butler, supra*, and therefore plaintiff's request for a preliminary injunction is denied.

Plaintiff requests that this ruling denying its request for a preliminary injunction be stayed pending appeal. This request is denied for the reason that granting the request would, in effect, give plaintiff the temporary injunction denied by this Court's ruling. 11 Wright & Miller, § 2904, p. 321. However, it is appropriate to stay this ruling long enough to allow plaintiff to seek relief from the United States Court of Appeals. *See Society for Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915, 916 (D.C. Cir. 1975).

IT IS HEREBY ORDERED that this ruling denying plaintiff's request for a preliminary injunction is stayed until 8:00 a.m. August 21, 1979, to permit plaintiff to seek from the United States Court of Appeals a further stay or injunction pending appeal under Rule 8 of the Rules of Appellate Procedure.

IT IS FURTHER ORDERED, with the consent of defendant's counsel, that the temporary restraining order (the state court's temporary injunction) remain in effect for the duration of the stay granted in the preceding paragraph without filing additional security. (Defendant's consent does not constitute a concession by defendant that the state court's temporary injunction, now this Court's temporary restraining order, is valid, and defendant reserves the right to continue to challenge its validity.)

DATED this 3rd day of August, 1979.

HAROLD D. VIETOR

HAROLD D. VIETOR
United States District Judge

APPENDIX F

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 79-1676

Iowa Power and Light Company, a Corporation, *Appellant,* *v.* Burlington Northern, Inc., a Corporation, *Appellee.*	Appeal from the United States District Court for the Southern District of Iowa.

February 12, 1980

Before LAY, Chief Judge,* and ROSS and HENLEY, Circuit Judges.

HENLEY, Circuit Judge.

This appeal requires us to determine whether the United States District Court for the Southern District of Iowa erred in denying a preliminary injunction which, if granted, would compel appellee Burlington Northern Railroad to transport coal at specified contract rates and would prevent a published Interstate Commerce Commission (ICC) tariff from taking effect.

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*The Honorable Donald P. Lay became Chief Judge of the Eighth Circuit on January 1, 1980.

We assume jurisdiction of this appeal pursuant to 42 U.S.C. § 1292(a). On examination of the record and relevant authority, we find that the district court's denial of a preliminary injunction was based on erroneous application of the principle that an established tariff rate, approved by the ICC, must prevail over a rate enumerated in a preexisting agreement. We view this case as factually distinguishable from cases articulating this rule of law, and, accordingly, we reverse the district court's denial of preliminary injunctive relief.

I. PROCEDURAL AND FACTUAL BACKGROUND

Appellant Iowa Power and Light Company (Iowa Power) is an Iowa corporation engaged in the business of generating, transmitting, distributing and selling electric energy and distributing and selling natural gas in Iowa. Iowa Power is a regulated public utility which supplies electricity to 119 incorporated communities and many rural areas located in 26 counties of Iowa having an area of 5,600 square miles and a population of 500,000. On December 31, 1978 Iowa Power had 244,100 electric customers.

Appellee Burlington Northern, Inc. (Burlington) is a common carrier by railroad incorporated in the State of Delaware. Burlington has been duly authorized to transact business in Iowa as a foreign corporation, and is engaged in the transportation of bituminous steam coal between points in the State of Wyoming and points in the State of Iowa including the destination of Council Bluffs, Iowa.

Council Bluffs Power Station Unit No. 3, located at Council Bluffs, Iowa, is jointly owned by Iowa Power and Iowa-Illinois Gas and Electric Company, Central Iowa Power Cooperative, Corn Belt Power Cooperative, Inc., Eastern Iowa Light and Power Cooperative, Inc., Cedar Falls Municipal Electric Utility, and Atlantic Board of Waterworks and Electric Light and Power Plant Trustees. Under an agreement between the joint owners, Iowa Power has full responsibility for constructing and operating the plant, including the purchase and transportation of its fuel supply.

The present dispute between Iowa Power and Burlington dates to 1973, when Iowa Power entered into negotiations to secure coal supplies over twenty years from AMAX Coal Company in Wyoming, and with Burlington Northern to provide rail transport for the coal. Negotiations for rail transport extended over several years and were finally reduced to a revised letter of understanding. The revised letter of understanding was submitted by Burlington Northern to Iowa Power on January 7, 1976 and accepted by Iowa Power on February 16, 1976.

Two exhibits were incorporated by reference in the January 7, 1976 letter of understanding. Exhibit A was a tariff including rates for transport of coal by unit train from Belle Ayr, Wyoming to Council Bluffs, Iowa for approximately twenty years. Exhibit B was designated a "memorandum of escalation outlining the methods and procedures that will be used to escalate the rates and charges . . . *in lieu of application of approved interstate ex parte increases.*" (Emphasis added.) The formula for escalation of rates in Exhibit B was supplemented by a "gross inequity" clause, allowing the shipper and carrier to resolve a gross inequity as a result of unusual economic conditions by mutual agreement, as follows:

> It is the intent of both BN and the shipper that the formula described above will compensate BN for any increases in the cost of transporting the shipper's coal tonnages above the 1973 base cost level. If either party should suffer a gross inequity as a result of unusual economic conditions, which result in the formula failing to fairly cover cost increases, such inequities will be resolved by mutual agreement between BN and the shipper. Pending such agreement, neither party shall be relieved of its obligation as outlined in the current effective tariff and regular escalation shall continue using the above formula in the interim.

In reliance on the letter of understanding, Iowa Power entered into a coal supply agreement with the AMAX Coal Company for the delivery of 40 million tons of low sulphur Wyoming coal during the period 1978 to December 31, 1997. Iowa Power also constructed unit 3 at its Council Bluffs Station at an approximate cost of $275 million, rebuilt the spur track at Council Bluffs to Burlington's specifications at a cost of $1.3 million, purchased 242 rotary dump coal cars presently in service at a cost of approximately $8 million, and entered a contract ordering 138 more rotary dump cars for January, 1980 delivery at an additional cost of approximately $5 million. The utility has also shipped coal from Belle Ayr, Wyoming to Council Bluffs, Iowa via Burlington in an amount totalling 1,400,748.29 tons in 1978 and 1,032,214.84 tons through June, 1979. Iowa Power paid Burlington over $7.5 million in 1978 and $5.8 million for the transportation performed through June, 1979. Substantial shipments of coal were also made subsequent to June, 1979.

These shipments have occurred under the cloud of the present rate dispute. As early as December, 1977, Burlington advised Iowa Power that it would not publish the contract rate of $5.23[1] because the ICC had approved coal rate adjustments in formal proceedings. The Commission had allowed higher rates to other shippers to become effective without suspension or investigation. Burlington offered to publish an above-contract rate of $6.32 and to hold this rate until July 1, 1979, while Iowa Power countered by insisting that Burlington honor the rate of $5.23, the escalated rate under the contract escalation formula.

As negotiations reached a stalemate, the parties sought resolution of the dispute in different forums. On December 23, 1977 Burlington indicated that it was invoking the gross inequity clause of the contract so as to publish with the ICC a capital investment incentive rate of $7.38. However, to allow shipments of coal to commence to move, Burlington published the $5.23 contract rate on an interim basis,[2] simultaneously filing tariffs to effectuate a

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[1] Rates are stated in amount per net ton.

[2] Freight Tariff 280, ICC No. 496 (subsequently renumbered ICC BN 4184). The $5.23 contract rate became effective February 1, 1978, and

(Footnote continued on following page)

non-contract rate.[3] The ICC determined that the non-contract rate of $7.38 did not qualify for capital incentive treatment under 49 U.S.C. § 10729,[4] and, in a separate proceeding, suspended the $7.38 rate from becoming effective, pending investigation, under the normal statutory notice provisions of 49 U.S.C. § 10707.[5]

Iowa Power in the meantime turned to the courts. According to the terms of 49 U.S.C. § 10707(c)(1), the Commission must render final decision on a suspended tariff within ten months or the tariff becomes effective by default. Four days before the deadline for an ICC ruling on the reasonableness of the non-contract rate of $7.38, Iowa Power on July 3, 1979 commenced this suit in Iowa District Court for Polk County, obtaining an ex parte temporary injunction against "any act [by Burlington] . . . that would result in an applicable rate different than that specified in the January 7, 1976 letter of understanding." *Iowa Power & Light Co. v. Burlington Northern, Inc.*, No. CE 11-6201 (Ia. D. Ct. for Polk County, July 3, 1979). As a non-resident defendant, Burlington obtained removal of the case on July 6, 1979 to the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. §§ 1441 and 1446. The parties stipulated that the temporary restraining order issued by the Iowa state court was deemed

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(Footnote continued from previous page)
carried a cancellation date of June 30, 1978, which was also the contemplated effective date of the $7.38 capital incentive rate. Due to a subsequent ICC decision and the present proceedings, the $7.38 rate has not become effective. Burlington continues to operate under the contract rate which, pursuant to the contract escalation clause, became $5.62 in September, 1978 and $6.00 in July, 1979.

[3] The railroad proposed supplement 8 to Tariff ICC BN 4184 to make the agreed rate expire July 6, 1979, and BN Tariff 290, ICC 541 (subsequently renumbered ICC BN 4187) to increase the transportation charge to $7.38.

[4] Docket No. 36792, *Incentive Rate on Coal—Belle Ayr, Wyoming to Council Bluffs, Iowa* (decided June 15, 1978); 359 ICC 201.

[5] Investigation and Suspension Docket No. 9199, *Unit-Train Rate on Coal—Burlington Northern, Inc.* (decided July 13, 1979) (hereinafter I & S 9199).

an order within the jurisdiction of the federal court, and that the temporary restraining order should be extended until hearing could be had on Iowa Power's petition for a preliminary injunction.

Before the Iowa district court could rule on Iowa Power's request for a preliminary injunction against non-contract rates, the ICC issued its decision as to the reasonableness of the $7.38 rate. In a short-form decision dated July 6, 1979, and a supplemental opinion rendered July 13, 1979 (I & S 9199), the ICC ordered cancellation of the $7.38 rate and held $7.25 to be the "[m]aximum reasonable rate . . . prescribed for the future." I & S 9199.[6] The ICC expressly declined to decide whether an enforceable contract exists between the parties, characterizing this as "a matter to be determined by a court."[7] *Id.* The Commission also made no comment on the reasonableness of the contract scheme, noting that Burlington "never filed a contract rate tariff"[8] for this particular movement." *Id.* The Commission therefore assessed the reasonableness of the $7.38 rate without reference to the underlying contract.

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[6] In compliance with the ICC ruling, Burlington on August 8, 1979 published a tariff reducing the $7.38 rate to $7.25.

Because of special increases authorized by the Commission, representing passthroughs of sharply rising costs for diesel fuel, the $7.25 rate had risen to $7.60 by the time the parties submitted briefs on this appeal. For convenience, we will refer to the reasonable maximum authorized by the ICC in I & S 9199 as the "$7.25 rate."

[7] In the prior proceeding to assess $7.38 as a capital incentive rate, the Commission appears to have assumed without deciding that an enforceable agreement exists between the parties. Docket No. 36792, *Incentive Rate on Coal—Belle Ayr, Wyoming to Council Bluffs, Iowa* (decided June 15, 1978); 359 ICC 201, 203-07.

[8] The contract rate of $5.23, as escalated under the contract escalation formula, was published by Burlington in Freight Tariff 280, ICC 496, renumbered ICC BN 4184. We are accordingly somewhat confused by the Commission's statement that "the carriers have never filed a contract rate tariff for this particular movement." We surmise that the rates agreed upon by the parties in the letter of understanding may not be "contract rates" within the ICC's definition of this term:

> A "contract rate" is a railroad freight rate arrived at through mutual agreement between a railroad . . . and a shipper in which the railroad agrees to provide service for a given price and *the shipper*

(Footnote continued on following page)

Hearing on Iowa Power's request for a preliminary injunction was held in Iowa district court on July 19, 1979, approximately two weeks after the ICC ruling approving $7.25 as a reasonable maximum rate. I & S 9199. On August 3, 1979, the Iowa district court entered its ruling denying preliminary injunctive relief on the ground that a contract rate is superseded by a subsequent, duly published ICC tariff. However, by agreement of the parties and by order of the district court, the temporary restraining order (the state court's temporary injunction) remained in effect to permit Iowa Power to seek a further stay or injunction pending appeal from this court under Fed. R. App. P. 8. *Iowa Power & Light Co. v. Burlington Northern, Inc.*, No. 79-296-D (S.D. Ia., Aug. 3, 1979).

This court on August 27, 1979 entered an injunction pending a determination on the merits of Iowa Power's appeal of the denial of preliminary injunctive relief. Until this litigation is resolved, Iowa Power was ordered to pay into the custody of the Iowa district court for deposit in an interest bearing account all moneys representing the difference between the rates sought by Burlington and the rate which Iowa Power deems applicable from July 7, 1979.

On review, the grant or denial of a preliminary injunction may be reversed if the trial court abused its discretion or based its decision on an erroneous legal premise. *FTC v. Nat'l Tea Co.*, 603

(Footnote continued from previous page)

> *agrees to tender a given amount of freight during a fixed period.* (Emphasis added.)

43 Fed. Reg. 58189 (1978) (to be codified as 49 C.F.R. § 1039.1). Under the letter of understanding, Iowa Power may not be obliged to tender a specified volume of traffic, and, thus, the ICC may not consider the $5.23 rate to be a contract rate within its definition of this term.

F.2d 694, 696 (8th Cir. 1979); *Dakota Wholesale Liquor, Inc. v. Minnesota,* 584 F.2d 847 (8th Cir. 1978); *Modern Controls, Inc. v. Andreadakis,* 578 F.2d 1264, 1270 (8th Cir. 1978). We acknowledge the difficulty of correctly applying legal precedent to Iowa Power's request for injunctive relief, but conclude that the district court erred in finding that well established precedent bars injunctive relief. Accordingly, we reverse on the ground that the district court based its decision on an erroneous legal premise.

II. THE EXISTENCE OF A CONTRACT

A preliminary issue on appeal is whether an enforceable contract exists between the parties. Burlington argues that the January 7, 1976 letter of understanding cannot be construed as a binding contract for several reasons: allegedly, no consideration passed between the parties; Burlington never intended to be bound for twenty years to the rate levels provided by the letter of understanding; and Burlington was obligated, if at all, only to attempt negotiation with Iowa Power before unilaterally publishing a non-contract rate.

Burlington failed to contest the parties' agreement on grounds of contract formation in district court. Interpretation of the letter of understanding was also not put in issue. Instead, Burlington argued and the district court agreed that enforcement of the parties' agreement was barred by operation of law.

It is inappropriate for this court to reach issues not presented to or decided by the district court. *Davis v. Campbell,* No. 79-1207 (8th Cir. Nov. 2, 1979); *Admiral Theatre Corp. v. Douglas Theatre Co.,* 585 F.2d 877, 890 (8th Cir. 1978); *Chen v. Palmer,* 589 F.2d 355 (8th Cir. 1978).[9] Matters of contract formation and interpretation may be raised, through amendment of pleadings at the discretion of the district court, at trial on the merits.[10] Fed. R. Civ. P. 15(a).

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[9] If we were to consider the issue of contract formation, we would be troubled by a contradiction in Burlington's position. The railroad apparently relied on the gross inequity clause in the letter of understanding when first attempting to negotiate higher rates, yet now denies that this same letter constitutes an enforceable contract.

III. ACCOMMODATION OF JUDICIAL AUTHORITY AND ICC JURISDICTION OVER RATE-MAKING

The district court's denial of a preliminary injunction was based on the rule of law articulated in *Farley Terminal Co. v. Atchison, Topeka & Santa Fe Ry.*, 522 F.2d 1095 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975), that an established tariff rate, approved by the ICC, must prevail over judicial enforcement of a rate enumerated in a preexisting agreement. *See also Armour Packing Co. v. United States*, 209 U.S. 56, 81-82 (1908); *Cincinnati N. O. & T. Pac. Ry. v. Chesapeake & O. Ry.*, 441 F.2d 483 (4th Cir. 1971); *Nebraska Public Power Dist. v. Burlington Northern, Inc.*, No. CV-79-L-151 (D. Neb. July 5, 1979) (order and memorandum granting preliminary injunctive relief on other grounds).

Two concepts underlie *Farley* and the line of precedent relied on by the district court: that of the carrier's managerial prerogative to initiate rates subject only to the ICC's revisory powers, *Farley Terminal Co. v. Atchison, Topeka & Santa Fe Ry., supra*, 522 F.2d at 1099; *Diamond Tank Transport, Inc. v. United States*, 23 F.Supp. 497, 501 (W.D. Wash.), *aff'd*, 305 U.S. 567

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[10] Issues of contract formation and interpretation for the district court's resolution include: (1) whether Burlington held out the letter of understanding to Iowa Power as a noncontractual, "gentleman's" agreement; (2) whether Iowa Power is obliged under the letter of understanding to tender a specified minimum volume of coal for shipment by Burlington, and, if not, whether there is consideration for Burlington's commitments in the letter of understanding; (3) whether Burlington covenanted in the letter of understanding to publish with the ICC only those rates specified in Exhibits A and B of the letter; (4) whether Burlington relies on the gross inequity clause as a basis for publishing nonnegotiated rates, and, if so, whether Burlington suffers from a gross inequity within the meaning of this contract term; (5) whether the parties are bound by the terms of their agreement to observe contract rates until such time as Iowa Power assents to renegotiated rates.

(1938); *United States v. Ill. Central R.R.*, 263 U.S. 515, 522 (1924); and that of the ICC's primary jurisdiction to effectuate nondiscriminatory rates. *Armour Packing Co. v. United States, supra*, 209 U.S. at 72; *Farley Terminal Co. v. Atchison, Topeka & Santa Fe Ry., supra*, 522 F.2d at 1098. We acknowledge the importance of these concepts in the regulatory scheme of the Interstate Commerce Act. However, we conclude on the facts and record before us that in the present instance, the ICC's jurisdiction and the railroad's managerial prerogative will not be impermissibly disturbed by the issuance of preliminary injunctive relief.

The distinctive feature of the present case, as compared with precedents cited by appellee, is the attitude of the ICC towards breach of a private carrier-shipper agreement. Prior to the controversy in *Farley*, the case most heavily relied on by both appellee and the district court, the ICC had by formal rulemaking procedures promulgated regulations requiring providers of trailer-on-flatcar (TOFC) service to publish, post and file tariffs containing rates for the leasing of TOFC equipment. This ICC directive constituted the Commission's "first general investigation" of TOFC service, and was an attempt "to lay down, through formal rules, certain guidelines for TOFC service and practices." Ex Parte 230, *Substituted Service-Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 ICC 301, 303, 323-24 (1964). The ruling of the Ninth Circuit in *Farley* must be seen against this background.

Three years after publication of this major ICC directive the Atchison, Topeka and Santa Fe Railway entered into lease agreements for TOFC service without filing or publishing rates as required by Ex Parte 230. The ICC subsequently served an order requiring the railroad to comply with its directive, although compliance resulted in the filing of tariffs at higher than the lease rates. Atchison's lessees brought suit to recover the difference between the charges they had paid under the published tariff and the rates specified in their preexisting leases. The Ninth Circuit denied relief, ruling that Congress intended "preexisting agreements to be abrogated by subsequently promulgated regulations." *Farley Terminal Co. v. Atchison, Topeka & Santa Fe Ry., supra*, 522 F.2d at 1099. The concern of both the court and the ICC was to enforce "the clear policy of the [Interstate Commerce] Act to secure equal rates for all," and to avoid enforcement of inconsistent contractual rates or rebates. *Id.* at 1098.

In the present case, by contrast, nothing in the record or the briefs suggests that the parties' private agreement is a threat to nondiscriminatory rate-making. Particularly decisive is the fact that the Commission itself appears to support enforcement of the Burlington-Iowa contract, as is evident in the ICC's ruling on $7.38 as a capital incentive rate. Docket No. 36792, *Incentive Rate on Coal—Belle Ayr, Wyoming to Council Bluffs, Iowa* (decided June 15, 1978); 359 ICC 201.

The Commission addressed the proposed $7.38 rate by noting that capital incentive rates are intended to encourage shipper investment in rail-related facilities. The Commission refused to approve $7.38 as a capital incentive rate after capital investments had been made by Iowa Power because to do so would "subvert the very type of cooperation between shipper and carrier that the statute is designed to encourage," *id.* at 206. Stating that "[s]hippers cannot be expected to make major investments unless they have some assurance that the negotiated terms of their agreements will be carried out," *id.*, the Commission condemned Burlington's "abrupt repudiation" of its agreement upon learning that capital incentive rates had been approved for other western coal carriers.[11] *Id.* at 204. Burlington had expressed no dissatisfaction with the Iowa Power contract until the day after the Commission served its decisions in other capital incentive cases. *Id.* at

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[11] *See Incentive Rate on Coal—Smithers Lake, Texas*, 358 ICC 537 (1977), and *Incentive Rate on Coal—Cochise, Arizona*, 357 ICC 683 (1977).

204 n.14. The strength of the Commission's opposition to Burlington's attempted breach of contract can be seen in its characterization of the railroad's actions as a "flagrant . . . abuse" of the negotiation process, bad faith, and an "attempt . . . to use [capital incentive provisions] as a weapon against a captive rail transportation user which has previously made more than a $1 million rail capital investment in reliance on a negotiated rate agreement." *Id.* at 206-07.

The ICC reaffirmed its support for the Iowa Power-Burlington agreement in its subsequent investigation and suspension of the $7.38 rate (I & S 9199), expressing regret that negotiations between Iowa Power and Burlington occurred before issuance of the new ICC policy which allows carriers to file tariffs proposing contract rates.[12] I & S 9199. Had such a tariff been filed, the Commission presumably would be empowered to order publication of the contract rate.[13] As a matter of policy, the Commission has stated that "private agreements based on escalation formulae . . . are not in violation of the [Interstate Commerce] Act." Ex Parte No. 318, *Increased Rates and Charges—1976* (order dated Feb. 27, 1977, served March 2, 1977). Where the ICC has indicated its support both for private agreements in general and for the private contract involved in this case, we perceive no threat to the Commission's primary jurisdiction over rates in an injunction enforcing the parties' agreement.

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[12] *See* Ex Parte 358-F, *Change of Policy, Railroad Contract Rates* (served Nov. 9, 1978), 43 Fed. Reg. 58189 (Dec. 13, 1978), and Ex Parte 358-F, *Change of Policy, Railroad Contract Rates* (General Policy Statement) (decided April 4, 1979), 361 ICC 205. Whereas the ICC in dictum had previously deemed "contract rates and agreed charges . . . unlawful per se," *Guaranteed Rates, Sault Ste. Marie, Ontario to Chicago,* 315 ICC 311, 323 (1961), the new policy recognizes as valid contract rates which are open to any shipper willing and able to ship a like kind of traffic under substantially similar circumstances and conditions. 316 ICC at 209.

[13] The Commission noted that it was without authority to order publication of an agreed rate in *Incentive Rate on Coal—Belle Ayr, Wyoming to Council Bluffs, Iowa, supra,* 359 ICC at 205.

Since the contract rate of $5.23 has been duly published, this is not an instance in which a secret carrier-shipper contract threatens the objective of nondiscriminatory ratemaking. *Cf. Armour Packing Co. v. United States, supra,* 209 U.S. at 81 (if rates are subject to alteration by special *secret* agreement, the ICC's ability to enforce a duly published, nondiscriminatory rate is impaired); *Kansas City So. Ry. v. C. H. Albers Comm'n Co.*, 223 U.S. 573, 596-98 (1912) (special rate agreement which departed from the established local rate for the benefit of a single shipper violated the Interstate Commerce Act and smacked of secret attempt to gain advantage). Injunctive enforcement of the contract rate also will not disturb the principle that the duly filed rate is the only lawful charge. *Dayton Coal & Iron Co. v. Cincinnati, N. O. & T. Pac. Ry.*, 239 U.S. 446 (1915); *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94 (1915); *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467 (1911); *Texas & Pac. Ry. v. Mugg*, 202 U.S. 242 (1906); *Johnson Machine Works, Inc. v. Chicago, Burlington & Quincy R.R.*, 297 F.2d 793 (8th Cir. 1962); *Silent Sioux Corp. v. Chicago & N.W. Ry.*, 262 F.2d 474 (8th Cir. 1959). Here, the contract rate is a duly filed rate.[14] Injunctive enforcement of this rate, pending the parties' direct appeal of the ICC order approving $7.25 as a reasonable maximum,[15] will not intrude upon the carrier's right to receive and the shipper's obligation to pay a duly published charge.

Finally, injunctive relief will not impair the railroad's acknowledged managerial prerogative to "initiate rates, and, in this connection, to adopt such policy of rate-making as to it seems wise." *United States v. Ill. Central R.R., supra,* 263 U.S. at 522. Nothing in *Ill. Central* or other precedent cited to us by appellee prevents a carrier from voluntarily contracting away a portion of its managerial prerogative for good and valuable consideration by agreeing to publish and keep in effect, subject to the Commission's review powers, specific rate and tariff provisions. Under the guise of managerial prerogative, we are unwilling to sanction Burlington's flagrant breach of the contract entered into and relied on in good faith by Iowa Power.

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[14] *See* n.2, *supra.*

[15] *See* nn. 22, 24, *infra.*

In summary, although we approach with caution any prospect of interference with the ICC's jurisdiction, we are convinced that neither precedent nor the record in this case bars the issuance of preliminary injunctive relief. We conclude that a railroad, as a common carrier under ICC jurisdiction, may be *injunctively* compelled to abide by a contractual freight rate until such time as the ICC determines that the contract rate has become unlawful or no longer falls within the zones of reasonableness.[16]

IV. JUDICIAL INTERFERENCE WITH ICC SUSPENSION POWER

Although we conclude that injunctive relief will not threaten the ICC's jurisdiction to set nondiscriminatory rates, Burlington argues in the alternative that an injunction will intrude upon a second sphere of Commission authority, namely the power to suspend rates pending determination of their reasonable and nondiscriminatory character. In addressing this contention, we find it necessary to reiterate pertinent facts.

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[16] *Accord, Southwestern Electric Power Co. v. Burlington Northern, Inc.*, Civ. No. M-79-96-CA (E.D. Tex. Aug. 13, 1979) (memorandum opinion and order granting preliminary injunction). We expressly decline to decide whether *damages* for breach of contract (as opposed to injunctive relief against a prospective breach) are recoverable by a contract shipper. Two cases heavily relied on by appellee hold that a shipper may not recover damages for breach of contract after a tariff providing for higher-than-contract rates has been published and approved by the ICC. *Farley Terminal Co. v. Atchison, Topeka & Santa Fe Ry., supra*, 522 F.2d 1095; *Cincinnati N. O. & Tex. Pac. Ry. v. Chesapeake & O. Ry., supra*, 441 F.2d 483.

In the present case, injunctive relief to prevent breach of contract rather than contract damages is sought. Thus, *Farley* and *Cincinnati* do not directly control. If breach of the parties' agreement had occurred, and if Iowa Power came before us seeking damages, we would be forced to consider whether the ICC's evident hostility to this breach permitted departure from the precedent of *Farley* and *Cincinnati*.

As Burlington correctly points out, the suspended $7.38 rate[17] would have taken effect by operation of law on July 7, 1979 if the Commission by this date failed to find the rate unreasonable. 49 U.S.C. § 10707(b)(1)(A). The Commission, however, issued a ruling on July 6, 1979 requiring cancellation of the $7.38 rate and allowing Burlington fifteen days to establish a rate no higher than the reasonable maximum of $7.25. I & S 9199. Burlington nevertheless asserts that the Commission's July 6, 1979 short-form decision did not prevent the $7.38 rate from becoming effective,[18] and consequently suspension of the $7.38 rate by judicial injunction is said to nullify an effective rate, in derogation of the ICC's exclusive power to suspend rates.

We know of no relevant authority, and Burlington cites none, for the proposition that a short-form decision is inadequate to render a proposed rate ineffective. Since it is clear that the Commission's *own* short-form decision, within the statutory suspension period, has nullified the $7.38 rate, an injunction against the already ineffective $7.38 rate is mere surplusage, and cannot be perceived to intrude upon the ICC's suspension power.

A more difficult question is presented by injunctive relief which renders ineffective the rate of $7.25, as duly published by Burlington[19] and as approved by the ICC.[20] The injunctive relief requested by Iowa Power would prohibit "*any act* that would result in [any] *applicable rate* different than that specified in the January 7, 1976 letter of understanding." (Emphasis added.) Thus the requested relief would prohibit collection of the $7.25 rate, although this rate, unlike the rate of $7.38, has received the ICCs approval as a reasonable maximum. I & S 9199.

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[17] For convenience and consistency we refer to the suspended rate as the "$7.38 rate", although this rate, including general increases, would have risen to $7.57 by July, 1979.

[18] Burlington's brief is not entirely clear as to why the July 6, 1979 decision failed to render the $7.38 rate ineffective.

[19] *See* n.6, *supra*.

[20] The proceedings which resulted in approval of $7.25 as a reasonable maximum are set forth at nn. 4, 5, *supra*.

We approach cautiously any injunctive interference with an ICC-approved rate in light of cases holding that the Commission has sole and exclusive power to suspend proposed rates pending final determination of their lawfulness by the ICC. *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 691 (1973); *Arrow Transportation Co. v. Southern Ry.*, 372 U.S. 658, 667 (1963). These cases, however, safeguard the Commission's jurisdiction to suspend or not to suspend rates pending final ICC determination. The underlying rationale is one of respect for the ICC's administrative domain.

In *United States v. SCRAP, supra*, for example, the Commission had decided not to suspend a surcharge pending investigation of the contested rate. The Supreme Court held that "the courts [lack authority] to grant any injunction before the Commission . . . finally determine[s] the lawfulness of [a] rate." Accordingly, an injunction during the investigative period had been erroneously entered by the district court. 412 U.S. at 691 & n.16. In *Arrow Transportation Co. v. Southern Ry., supra*, the statutory suspension period had expired but the ICC had made no final decision on the reasonableness of the contested rate. 372 U.S. at 660. Noting that "disposition of an application for injunctive relief would . . . require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable," *id.* at 669–70, the Court concluded that injunctive relief would create the hazard of forbidden judicial intrusion into the administrative domain. *Id.* The basic problem lay in an independent judicial determination of reasonableness before the ICC had had an opportunity to pass final judgment on this issue. *Id.* at 670–71.

After careful assessment, we find the present case factually distinguishable from the important precedents of *Arrow* and *SCRAP*, both in the timing of the injunctive relief here requested and in the asserted basis for such relief. A preliminary injunction here was sought in Iowa district court *after* the ICC's final, July 6, 1979 ruling on the reasonableness of the $7.25 rate.[21] Thus, unlike the situation in *Arrow*, issuance of a preliminary injunction would not have required judicial comment upon a rate prior to the ICC's assessment of it.

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[21] Injunctive relief was first sought in Iowa state court on July 3, 1979 before the ICC's ruling on the $7.25 rate. By the time the parties

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More important, the request for injunctive relief here was premised on the parties' underlying contract. By contrast, injunctive relief in *Arrow* was sought on the basis of the alleged unreasonableness of a proposed rate, at a time when the ICC had not yet rendered decision as to the reasonableness of the contested rate. There is less danger here of judicial intrusiveness, because the district court could have granted a preliminary injunction without reference to or interference with the Commissions's determination that the $7.25 rate is a reasonable maximum. The ground pleaded for a preliminary injunction is *not* the unreasonableness of the $7.25 rate as an upper *maximum*, but rather the enforceability of the parties' contract rate until such time as the ICC finds this to be an unreasonably *low* rate. *Cf. Arrow Transportation Co. v. Southern Ry., supra*, 372 U.S. at 670–71 (unreasonableness of a proposed rate was the sole ground for injunctive relief); *United States v. SCRAP, supra*, 412 U.S. at 692–93 (no injunction could issue on ground that the National Environmental Policy Act had eroded Commission's exclusive power to suspend rates).[22]

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removed the case to federal court for a decision on Iowa Power's request for a preliminary injunction, the ICC had issued its July 6, 1979 ruling in I & S 9199.

[22] Petition for direct review of the ICC's decision in I & S 9199, approving the $7.25 rate as a maximum, is pending before this court in a separate proceeding. *See* n.24, *infra*. To clarify the boundaries between this appeal and the direct appeal of I & S 9199, we offer the following comments.

Here we hold only that an injunction based on the parties' contract does not intrude upon the ICC's authority to set a reasonable maximum rate or the Commission's suspension power. The parties' contract is enforceable in the special circumstances of this case, where the Commission has merely set an upper rate limit and where the Commission has made no decision finding the contract rate unreasonably low.

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V. INTERFERENCE WITH THE CONGRESSIONAL POLICY

As a third ground for denial of injunctive relief, Burlington argues that an injunction will thwart the Congressional policy embodied in § 205 of the Railroad Revitalization and Regulatory Reform Act of 1976.[23] Congress has directed the ICC to establish for railroads revenue levels adequate to cover "total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital." 49 U.S.C. § 10704(a)(2).

In I & S 9199, the Commission directly addressed its responsibilities under the Railroad Revitalization Act by calculating appropriate revenue-need factors and adopting $7.25 as a rate seven per cent above Burlington's fully allocated costs. Burlington argues that the $7.25 rate implements the national policy of revitalizing the nation's railroads. According to Burlington, this policy must not be disturbed by injunction against the rate.

The argument is compelling. However, it is not properly before us on this appeal. Burlington essentially argues (1) that $7.25 is a reasonable rate within the meaning of Congress' policy directives, and (2) that the ICC was correct in failing to consider breach of contract and bad faith as facts bearing on the reasonableness of the rate. The reasonableness of the $7.25 rate was not argued as a basis for denying injunctive relief in district court, and moreover the reasonableness of the $7.25 rate has been placed squarely before this court for review in a separate, direct appeal of the

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The reasonableness of the $7.25 rate in light of the pre-existing contract is the heart of the appeal of I & S 9199, noted at n.24, *infra*. We leave for direct appeal of I & S 9199 the issue whether $7.25 is a reasonable rate regardless of the underlying contract, or, alternatively, whether the ICC erred in approving the $7.25 maximum without reference to Burlington's breach of contract.

[23] 49 U.S.C. § 10704(a)(2) (1978) (hereinafter "Four-R-Act" or "Railroad Revitalization Act").

Commission's rate order in I & S 9199.[24] We reserve for direct appeal a review of the reasonableness of the $7.25 rate, which, if applied, will breach the parties' contract but which may also be necessary to carry out Congress' policy directives.[25]

VI. THE STATE COURT INJUNCTION

We dismiss without lengthy discussion Burlington's final argument, that the temporary injunction issued by the Iowa state court failed to prevent the rate of $7.38 from becoming effective. The railroad contends that the state court injunction, issued July 3, 1979, did not comply with Rule 30 of the Fifth Judicial District of Iowa.[26] Moreover, even if the injunction was initially effective, Burlington states that the ex parte order was subject to automatic expiration within three days. Consequently, the injunction is said by Burlington to have expired on July 6, 1979, with the result that $7.38 took effect as an applicable rate on July 7, 1979.

This argument ignores the fact that the $7.38 rate was rendered unlawful by the ICC's July 6, 1979 decision (I & S 9199). Since the ICC effectively nullified the rate, the validity of the state court's order is a moot question which we decline to reach. *Allen v. Likins,* 517 F.2d 532 (8th Cir. 1975); *Cameron v. Whirlwindhorse,* 494 F.2d 110, 113 (8th Cir. 1974).

VII. IRREPARABLE INJURY AND BALANCE OF HARDSHIPS

Finally we note that Iowa Power has made a stong showing that it will suffer irreparable harm if relief is not forthcoming, and that the balance of hardship tips decidedly in its favor. *Minn. Ass'n of*

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[24] *Iowa Power & Light Co. v. ICC, et al.,* consolidated appeals Nos. 79-1747, 79-1748, 79-1749, 79-1550, 79-1534 (8th Cir., filed July 9, 1979).

[25] For further delineation of the issues reserved for direct review of I & S 9199, *see* n.22, *supra.*

[26] Rule 30, Rules of Practice, Fifth Judicial District of Iowa, requires that good cause be shown for issuance of an ex parte temporary injunction.

Health Care Facilities, Inc. v. Minn. Dept. of Public Welfare, 602 F.2d 150 (8th Cir. 1979); *Planned Parenthood of Minn., Inc. v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977).

Without issuance of an injunction against the non-contract tariff, the utility estimates that it will pay an extra $3.1 million in freight charges. It is highly doubtful that these charges can be recovered in an action for breach of contract under the rule of *Farley Terminal Co. v. Atchison, Topeka & Santa Fe Ry., supra*, 522 F.2d 1095.[27]

The harm to Iowa Power from increased transport costs is not dispelled by an energy cost adjustment clause in the utility's tariff. Although this clause allows the utility to pass along cost increases to customers, the clause is examined regularly by the state regulatory commission and is subject to revision at any time. Improper increases may be disallowed. Iowa Code § 476.4 (1979). *Cf. Hayes v. City University of New York*, 454 F.Supp. 1118 (S.D. N.Y. 1978) (no irreparable harm exists where students, faced with reductions in public assistance, were assured of being maintained at the same "level of need" from other sources).

Even if the utility were guaranteed a reimbursement of higher transport costs by the consuming public, the harm to the utility would not thereby be legally lessened. Courts are familiar with this "pass-on defense", and in various contexts have held that an ability to pass on higher costs does not minimize the injury to one who initially pays more than the lawful price. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 488 (1968) (antitrust context); *Adams v. Mills*, 286 U.S. 397, 406–08 (1932) (reparations owed for unlawful transport charges cannot be escaped by a plea that the ultimate incidence of the injury was not upon those first compelled to pay the unlawful charge); *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918) (shipper allowed to recover reparations for railroad's unreasonably higher rates regardless of ability to recover costs from customers). *Accord, Southwestern Elec. Power Co. v. Burlington Northern, Inc., supra,* No. M-79-96-CA (E.D. Tex. Aug. 13, 1979) (any contractual arrangement between utility and customers, allowing pass-through of costs, does not inure to the benefit of railroad carrier so as to allow his violation of agreed-to rate schedule and does not lessen the shipper's irreparable harm from breach of contract).

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[27] In *Farley*, the Ninth Circuit held that damages for breach of contract were not recoverable after a carrier files and the ICC approves a rate tariff in violation of an underlying shipper-carrier contract. We do not in this action decide whether Iowa Power could recover damages for breach of contract. *See* n.16, *supra*. However, we would regard the *Farley* case as a strong impediment to the recovery of breach of contract damages were Iowa Power to seek such damages from this court.

Balanced against the harm to Iowa Power from unrecoverable freight charges is the cash-flow shortage which Burlington will experience from the issuance of injunctive relief. This is the *only* harm which the railroad can expect to suffer, since up to this time moneys representing the railroad's preferred rates have been deposited in an interest-bearing account pending resolution of this litigation. The courts are fully capable of continuing such an account or of making such other protective orders as conditions may require.

Accordingly, the judgment of the district court is reversed and the case if remanded for further proceedings consistent with this opinion.

LAY, Chief Judge, dissenting.

I respectfully dissent. I would affirm the district court's denial of injunctive relief for the reason that Iowa Power has failed to state a claim upon which relief may be granted.

Burlington Northern published a rate of $7.38, an increase over the then effective $5.23 rate that had been determined in accord with the parties' letter of understanding.[1] The ICC suspended the proposed increase pursuant to investigation into its lawfulness, 49 U.S.C. § 10707. During the statutorily limited suspension period, this action prevented the $7.38 rate from going into effect at the time it otherwise would have. Iowa Power also filed a complaint agianst expiration of the contract rate pursuant to 49 U.S.C. §§ 11701, 11704-05. In that proceeding, which was consolidated with the ICC investigation under section 10707, Iowa Power argued Burlington Northern breached its agreement, thus committing an unreasonable practice under section 11701. Following investigation, the ICC ruled the $7.38 rate was not reasonable, and prescribed a maximum reasonable rate of $7.25, a rate above that applicable under the terms of the parties' letter of understanding. It ruled, inter alia, that the alleged breach of agreement by Burlington Northern was not an unreasonable practice under the Act, even in light of the new ICC policy concerning lawfulness of contract rates. *See* Ex Parte 358-F; page 15 & n.12, *supra*. Iowa Power immediately petitioned this court for review of the order. This appeal is presently pending. *Iowa Power and Light Co. v. Interstate Commerce Commission*, No. 79-1534 and consolidated cases (8th Cir. petition for review filed July 6, 1979). The ICC order gave Burlington Northern 15 days to establish a rate within the reasonable maximum of $7.25; it published a tariff reducing the $7.38 rate to $7.25 on August 8, 1979.

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[1] Earlier, the ICC had denied Burlington Northern's application for capital incentive treatment for the rate, which Iowa Power had opposed.

Iowa Power simultaneously filed suit against Burlington Northern for breach of contract. Three days before the ICC decision, it obtained from an Iowa state court an ex parte injunction against any act by Burlington Northern "that would result in an applicable rate different than that specified in the January 7, 1976 letter of understanding." Upon removal to federal district court, the temporary restraining order was extended until a preliminary injunction was denied.[2] By reversing the district court, this court now compels Burlington Northern to collect only the rate specified in the parties' letter of understanding rather than the published and ICC approved $7.25 rate.

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[2] On motion for a stay pending this appeal, this court ordered Iowa Power to pay the difference between the amount sought by Burlington Northern and the rate Iowa Power deems applicable into an interest bearing account.

I respectfully disagree with this result, since I believe this court is precluded from granting such relief. As the district court held, a court is not empowered, in a common law action commenced in the district court, to grant as relief enforcement of a rate other than the rate established pursuant to the procedures set forth in the Interstate Commerce Act. The Commission order that set the maximum reasonable rate, and under which Burlington Northern published its $7.25 rate, is directly reviewable under the Act, and it is already before this court in the above indicated separate appeal. Any error in the Commission's treatment of the parties' private agreement that is cognizable under our limited power of review may and should be corrected in and only in that proceeding. The Commission's ratemaking cannot be collaterally attacked by an original common law action filed in the district court.

As the majority opinion states, page 11, *supra*, the rule of law is "that an established tariff rate, approved by the ICC, must prevail over judicial enforcement of a rate enumerated in a preexisting agreement." *Farley Terminal Co., Inc. v. Atchison, Topeka & Santa Fe Railway*, 522 F.2d 1095 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975); *see also Kansas City Southern Railway v. C. H. Albers Commission Co.*, 223 U.S. 573 (1912); *Louisville & Nashville Railway v. Mottley*, 219 U.S. 467 (1911); *Armour Packing Co. v. United States*, 209 U.S. 56, 81–82 (1908); *Texas & Pacific Railway v. Mugg*, 202 U.S. 242 (1906); *Chicago, Burlington & Quincy Railroad v. Ready Mixed Concrete Co.*, 487 F.2d 1263 (8th Cir. 1973); *Cincinnati, New Orleans & Texas Pacific Railway v. Chesapeake & Ohio Railway*, 441 F.2d 483, 488 (4th Cir. 1971). The majority holds the district court erred in applying these precedents, because of a distinctive feature in this case. This is the attitude of the ICC toward breach of the shipper-carrier agreement in this case, as shown by statements in its earlier decision denying Burlington Northern special capital incentive treatment for the proposed $7.38 rate, and shipper-carrier agreements in general, as seen in recent ICC policy. Page 15–16, *supra.* The majority's reasoning also seems to assume the presently published rate of $7.25 is not the "established tariff rate," apparently because either the temporary restraining order prevented it from becoming the effective rate or the ICC order "merely set an upper rate limit" or maximum rate. Page 22 n.22, *supra; see* pages 21-22, *supra.*

The latter proposition was rejected in *Arizona Grocery v. Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370, 386–88 (1932). The ICC's decision to prescribe a maximum reasonable rate rather than a specific rate does not give courts latitude to enjoin collection of a subsequently established rate and enforce one set by a prior private contract. The carrier filed and published rate is the legal rate under the Act; when filed pursuant to an ICC finding of the maximum reasonable rate, it is also a lawful or reasonable rate. *Id.* at 387. It is as binding as a rate filed pursuant to ICC prescription of a specific rate. *Id.* at 388. Thus the $7.25 rate, published pursuant to the ICC order prescribing it as the maximum reasonable rate, is legally effective, lawful and reasonable; it is no less binding than it would be if the ICC had prescribed $7.25 as the specific rate rather than the maximum reasonable rate.

The $7.25 rate is the established rate. It is not merely a rate among many possible rates within the reasonable maximum set by the ICC, because there may only be one legally effective rate at a time. *See e.g. Armour Packing Co. v. United States*, 209 U.S. 56, 81–82 (1908) and cases cited at page 16, *supra.* The one rate has the force of statute and is binding on both shipper and carrier. *See Lowden v. Simonds-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *Pennsylvania Railroad v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913); *Farley Terminal Co. v. Atchison, Topeka & Santa Fe Railway*, 522 F.2d 1095 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975). The contract rate may be "a duly filed rate" as the majority says, page 16, *supra*, but that fact does not equate it with the legal rate established pursuant to ICC procedures. Due to the ICC's prescription of a reasonable maximum in excess of the contract rate and Burlington Northern's subsequent publication of that maximum, under normal statutory procedures $7.25—*not* the contract rate—is the established rate.[3] This is true notwithstanding the fact that the contract rate was filed and was once the effective rate. The majority admits its decision precludes collection of the $7.25 rate, the lawful rate established under the Act. This court is not free to substitute another rate for the lawful rate simply because the ICC has not ruled that rate is unreasonable.

The authority which recognizes only one lawful rate is distinguished by the majority in describing the *Armour* statements as prohibition against secret rate agreements, which pose a threat of discrimination. *See* page 16, *supra. Armour* may stand for that, but it and the cited cases also stand for the proposition that there is but one legally effective rate because the existence of two procedures to set rates, one through the Act's procedures and the other by private agreement, would allow indirect and uncertain methods of setting and changing rates. *Armour Packing Co. v. United States*, 209 U.S. at 81. The threat of indefiniteness and uncertainty exists regardless of whether the contract rate is secret or was once published, if a court may order parties bound by a rate that is not the one established by the normal statutory or regulatory procedures.

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[3] The injunction against collection of the published rate while the district court proceeds to determine the issue of contract breach that is required by the majority opinion is only effective pending the outcome of the direct review proceeding in *Iowa Power and Light Co. v. Interstate Commerce Commission*, No. 1534 and consolidated cases (8th Cir. petition for review filed July 6, 1979); *see* page 16, *supra*. Should this court uphold the ICC order on direct review and thus the lawfulness of the $7.25 published rate, the effect of our action upon the district court proceedings will have to be assessed. Iowa Power admitted below that damages would be precluded if the higher rate went into effect under the doctrine of *Farley Terminal Co. v. Atchison, Topeka & Santa Fe Railway*, 522 F.2d 1095 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975). Thus, our decision on review of the ICC order in No. 79-1534 could moot the district court action by precluding any grant of relief. This illustrates the confusion and uncertainty caused by allowance of what is in effect two ratemaking procedures.

The standard for granting judicial relief in a collateral court proceeding such as this and that in *Armour*, in contrast to direct review of an ICC order, is whether exercise of the judicial remedy is consistent with the statutory scheme of regulation. *See Nader v. Allegheny Airlines*, 426 U.S. 290, 298–300 (1976) (tort action for overbooking does not require reference to agency); *Hewitt-Robins v. Freight-Ways*, 371 U.S. 84, 89 (1962) (damages for motor carrier routing practice as opposed to ICC regulation) *Texas & Pacific Railroad v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (damages for unreasonable rail carrier rates as opposed to ICC regulation). In regard to enforcement of a private contract that purports to set a rate for rail transportation subject to the Interstate Commerce Commission, *Armour* and *Mottley* early established that the statutory scheme allowed only one rate and set an exclusive means of establishing that rate, thus precluding judicial enforcement of an inconsistent contract rate. *See Farley Terminal Co. v. Atchison, Topeka & Santa Fe Railway*, 522 F.2d at 1098–99 & n.3.

Iowa Power contends, of course, that relief may be granted in a common law action for breach of contract because contractual duty and not the Act's standard of reasonableness, determination of which is admittedly committed by the Act to the ICC, is the question upon which relief depends.[4] Thus, as the majority concludes, judicial relief will not interfere with the ICC's primary jurisdiction. This argument misses the mark. Regardless of whether judicial relief depends upon a question within the ICC's primary jurisdiction, it is precluded if its grant is inconsistent with the statutory scheme of regulation. *Hewitt-Robins v. Freight-Ways*, 371 U.S. at 89. If inconsistent, relief simply may not be granted upon what would otherwise be "an actionable breach." *Farley Terminal Co. v. Atchison Topeka & Santa Fe Railway*, 522 F.2d at 1097; *Aero Trucking Inc. v. Regal Tube Co.*, 594 F.2d 619, 622–23 (7th Cir. 1979) (Motor Carrier Act).[5]

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[4] In its investigation into the lawfulness of the higher $7.38 rate, the ICC considered the alleged breach of agreement, and the fact that the agreement predated the new ICC contract rate policy. It set a reasonable maximum far higher than the contract rate. While Iowa Power contends reasonableness is not the issue in this breach of contract action, it argued the existence of the contract was a factor for the ICC to consider in its reasonableness decision, and again presses the argument here on direct review of that decision.

The point is not that rates set by contract are frowned upon by the legislature, courts or the ICC. Rather, it is that judicial enforcement of a rate set by private contract over one set by the normal operation of statute undercuts the stability of the ratemaking process and rate structure which statutory procedures were designed to ensure. Thus, the ICC may change its policy prohibiting contract rates and allow a rate agreed upon in a contract to become effective under the normal procedures set forth in the Act and regulations. This change of attitude by the ICC in the course of carrying out its functions under the Act does not alter the fact that a private contract cannot provide authority for a court, in an action to which the ICC is not a party, and which is not the judicial review authorized by the Act, to enforce a rate different from that established through the statutory procedures. That is what has happened here.

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[5] While the majority manages to distinguish cases prohibiting judicial extension of or review of an ICC decision to suspend a proposed new rate pending its investigation of reasonableness and lawfulness, page 20, *supra*, these cases are not analogous. In *United States v. SCRAP*, 412 U.S. 669 (1973), the Court held Congress had not given courts authority to suspend a proposed rate. The ICC has exclusive jurisdiction to suspend final decision on lawfulness, made after suspension and investigation, is judicially reviewable. As discussed, this court has such a final order before it for direct review in Iowa Power's appeal of the ICC order setting $7.25 as the reasonable maximum rate. The existence of that final order does not, however, provide this court with authority to enjoin collection of the published and approved rate in a collateral breach of contract action. The Act does not allow judicial intervention in the ratemaking process by suspension order, *id;* nor does it allow judicial intervention by injunction against collection of the lawful rate in a collateral contract suit.

The majority perceives the inequity of Burlington Northern's alleged breach and properly refuses to sanction it; yet as was noted in the early *Armour* decision, 209 U.S. at 81–82, such business equity arguments are not appropriately addressed to a court. The ICC has by rulemaking remedied the situation under the circumstances described in its regulations. 43 Fed. Reg. 58189 (1978) (to be codified in 49 C.F.R. §§ 1039.1–.4); *see* page 15, *supra*. However, the Act still precludes courts from rendering ineffective on the basis of private contracts rates which would otherwise go into effect under the statutory scheme of regulation.

Because of a judicial sense of equity this court cannot grant relief otherwise precluded by the Act.

APPENDIX G

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1980

No. 79-1676 Iowa Power and Light Company, a Corporation, *Appellant,* *vs.* Burlington Northern, Inc., a Corporation, *Appellee.*	Appeal from the United States for the Southern District of Iowa.

No. 80-1959 Burlington Northern, Inc., *Petitioner,* *vs.* United States of America, et al., *Respondents.* Iowa Power and Light Company, *Intervenor-Respondent.*	Petition for review of order of the Interstate Commerce Commission.

Petition of Burlington Northern, Inc. for rehearing with suggestions for rehearing en banc, having been considered by the Court, is hereby denied.

It is further ordered by the Court that the petition of Burlington Northern, Inc. to vacate the order of this Court of May 8, 1981, is denied.

July 20, 1981

Opposition

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FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-755

IN THE

Supreme Court of the United States

October Term, 1981

BURLINGTON NORTHERN, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
IOWA POWER AND LIGHT COMPANY,
Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LYNN K. VORBRICH
CURTIS L. RITLAND
666 Grand Avenue
Des Moines, Iowa 50309

*JOHN M. CLEARY
FREDERIC L. WOOD
NICHOLAS J. DiMICHAEL
DONELAN, CLEARY, WOOD
& MASER, P.C.
914 Washington Building
Washington, D.C. 20005
(202) 783-1215

Attorneys for Respondent Iowa Power & Light Company

**Counsel of Record upon whom service is to be made*

December 18, 1981

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTIONS PRESENTED

1. Whether certain provisions of the Staggers Rail Act of 1980, signed October 14, 1980, should be applied to a case begun before the Interstate Commerce Commission in September, 1978, where the words and legislative history of the statute reveal that it is not to be applied to pending cases, and where applicable precedent reveals that it would be a manifest injustice to do so.

2. Whether the Interstate Commerce Commission may consider an agreement between a shipper and a rail carrier concerning a rail rate as evidence in determining a maximum reasonable rate.

3. Whether the doctrine of *Arizona Grocery Company v. Atchison, Topeka & Santa Fe Railway,* 284 U.S. 370 (1932), limits the power of a court to disburse monies contained in an escrow fund established by that court to a shipper who has paid such disputed monies into that fund, when those monies have been determined by the Commission to be payments in excess of a maximum reasonable rate.

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-755

BURLINGTON NORTHERN, INC.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
IOWA POWER AND LIGHT COMPANY,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent Iowa Power and Light Company (Iowa Power) respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner Burlington Northern Inc. (BN) on October 19, 1981. Iowa Power is a public utility engaged in the generation of electric energy in the State of Iowa. It was a protestant/complainant in the proceedings before the Interstate Commerce Commission (Commission) and an intervenor-respondent in support of the decision of the Commission before the court of appeals. The proceedings before the Commission involved the reasonableness of a rail rate for the transportation of approximately 2 million tons of coal per year to Iowa Power's generating station at Council Bluffs, Iowa, and an agreement signed between Iowa Power and BN as a factor in determining the reasonableness of that rate. Iowa Power accepts BN's citation to the opinion below, its statement of jurisdiction and the citation to the relevant statutory provisions. However, Iowa Power believes that BN's Statement of the Case does not fully reflect the facts of this case. Iowa Power's Statement of the Case and its Argument setting forth the reasons for denying BN's Petition for Certiorari are set forth below.

STATEMENT OF THE CASE

A. Rate Negotiation and Agreement

In late 1972, Iowa Power announced plans to build a 600 megawatt coal-fired electric generating plant at Council Bluffs, Iowa. It immediately began to seek a source of low sulphur coal capable of supplying two million tons of coal per year for a period of 20 years. Iowa Power's request to various coal suppliers for such a proposal indicated that any decision on a coal supply would be subject to the ultimate development of satisfactory transportation arrangements. (C-5)[1] On June 15, 1973, Iowa Power tentatively entered into an agreement with Amax Coal Company (Amax) to purchase 35 million tons of coal. The agreement with Amax stated that the signing of a final coal supply contract was contingent upon "negotiations to secure a satisfactory freight rate." (C-6)

Shortly thereafter, Iowa Power entered into negotiations with BN on a freight rate to be contained in a tariff for the proposed coal movement from Amax's mine in Wyoming to Council Bluffs. By letter dated June 26, 1973, BN offered a rate of $3.21 per ton subject to escalation each year on July 1 under an escalation formula previously furnished to Iowa Power. (C-6) In a letter dated July 25, 1973, Iowa Power formally accepted BN's offer. Iowa Power then concluded a 20-year coal supply contract with Amax. Finally, after settling a number of operational details with the railroad, on February 16, 1976 Iowa Power and BN signed a formal Letter of Understanding memorializing the agreement, including the agreed-to escalation formula. (C-6)

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[1] References are to the Appendices attached to the BN's Petition for Certiorari. The court of appeals found that there was substantial evidence to support all of the findings of the Commission. (A-21-22).

B. BN's Attempted Breaches of The Agreement

On December 2, 1977, or only one month before the deliveries of coal were scheduled to begin, BN personnel met with Iowa Power and declared that if Iowa Power would not accept an increase in the agreed-to rate (then at a level of $5.23), BN would invoke certain "capital incentive rate" provisions of the Interstate Commerce Act to establish a higher rate.[2] (C-7) On December 15, 1977, Iowa Power rejected the railroad's proposal and called upon BN to honor its long-standing commitment. BN refused, and instead filed a capital incentive rate proposal of $7.38 with the Commission. Iowa Power protested the proposed increase. In a decision served June 21, 1978 in *Incentive Rate on Coal — Belle Ayr, Wyoming to Council Bluffs, Iowa,* 359 I.C.C. 201 (1978) [*Incentive Rate*], the Commission found that the proposed rate did not qualify under the statute "based on BN's abuse of the negotiating process. . . ." The Commission found that Iowa Power and BN had entered an agreement and that the BN had "reneged on its agreement." *Incentive Rate,* 359 I.C.C. at 203-204, 209.

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[2] These provisions were published at 49 U.S.C. § 10729, but were repealed on October 1, 1980 by Section 210 of the Staggers Rail Act of 1980.

The Commission's decision in *Incentive Rate* did not deter BN. On August 3, 1978, BN again proposed an increase from the agreed-to level, which had escalated by that time to $5.62, to a level of $7.38. That second attempted increase was suspended by the ICC for the full statutory period by an order served on September 6, 1978 in I&S 9199, *Unit-Train Rates on Coal – Burlington Northern Inc.*, the instant case.

C. The Commission's Contract Rates Policy Statement, The First *Iowa Power* Decision and Subsequent District Court Proceedings

On November 9, 1978, the Commission issued a policy statement in Ex Parte 358-F, *Change of Policy Railroad Contract Rates,* published at 43 Fed. Reg. 58189 (December 13, 1978) [*Contract Rates*]. In that statement, the Commission declared that rate agreements between shippers and carriers "are not in and of themselves unlawful, and they may be beneficial in many situations." The Commission indicated that the lawfulness of such agreements "will be determined on a case by case basis." 43 Fed. Reg. at 58190.

On July 13, 1979, the Commission issued its first full decision in I&S 9199. It declared that the suspended $7.38 rate was not lawful, but established a maximum reasonable rate for the future of $7.25, or far above the agreed-upon level, as then escalated, of $5.62. The ICC declared that even though the parties had an understanding as to the rate, the Commission would not consider the agreement in its determination of the maximum reasonable rate since "negotiations between these parties occurred before issuance of our [*Contract Rates*] policy statement." (D-12) Both BN and Iowa Power sought judicial review, which proceedings were eventually consolidated before the Eighth Circuit.

In its July 13, 1979 decision, the Commission noted that the question of whether the agreement between Iowa Power and BN constituted an enforceable contract "is a matter to be determined by a court." (D-12) On July 3, 1979, Iowa Power had commenced a suit in Iowa district court for breach of contract. That court entered a temporary restraining order prohibiting BN from breaching its agreement by placing into effect any tariff that would result in an applicable rate different from that contained in the agreement. The Iowa court further ordered a bond to be posted by Iowa Power. On July 6, 1979, BN removed the case to the United States District Court for the Southern District of Iowa, which continued the temporary restraining order.

On August 3, 1979, the District Court denied Iowa Power's request for a preliminary injunction, but stayed its ruling to permit Iowa Power to seek a further stay or injunction pending appeal. On August 14, 1979, Iowa Power applied to the United States Court of Appeals for the Eighth Circuit in a case designated as No. 79-1676, *Iowa Power and Light Company v. Burlington Northern,* for an injunction pending appeal. On August 27, 1979 the Eighth Circuit entered an order continuing the restraining order indefinitely until further order of the court, and increased the bond. Finally, on September 24, 1979, the Eighth Circuit amended its August 27, 1979 injunctive order to provide that Iowa Power could pay into an escrow account the monies representing the difference "between the rates sought by Burlington Northern and the rate which Iowa Power and Light Company deems applicable" under the alleged agreement in lieu of a bond.

D. Remand to The ICC of The First *Iowa Power* Decision and The Eighth Circuit's Original Decision in No. 79-1676

Meanwhile, judicial review of the Commission's first July, 1979 *Iowa Power* decision was also continuing in the Eighth Circuit. On January 24, 1980, after initial briefs were filed, the Commission filed a motion to remand the cases involving Iowa Power because the Commission had voted to reconsider its decision to give no consideration whatever to the agreement between Iowa Power and BN in determining the maximum reasonable rate.

On February 21, 1980, the Commission issued a further policy statement in its Ex Parte 358-F *Contract Rates* proceeding. In this second policy statement, the Commission concluded that the fact that a rate agreement was negotiated prior to the Commission's first *Contract Rates* policy statement was not an appropriate reason for giving such agreements no consideration at all in determining a maximum reasonable rate. The Commission established policies for determining whether and to what extent such agreements would be considered in a maximum rate determination. 45 Fed. Reg. 21720 (April 2, 1980).

On February 12, 1980, the Eighth Circuit issued a decision on the merits in No. 79-1676. (App. F) This decision reversed the district court's denial of the preliminary injunction. The Eighth Circuit ruled that it was lawful for BN and Iowa Power to enter into a rate agreement; that such agreement did not interfere with the Commission's jurisdiction over ratemaking; and that issuance of an injunction in the specific facts of that case would not interfere with the ICC's authority. On March 21, 1980, the Eighth Circuit granted a petition for rehearing of its February 12, 1980 decision.

Finally, on May 7 1980, the Eighth Circuit granted the ICC's motion to remand the judicial review of the ICC's July, 1979 decision involving Iowa Power. The Eighth Circuit closed the cases related to the proceedings involving Iowa Power.

E. The Commission's Second *Iowa Power* Decision, Passage of The Staggers Act, and Proceedings on Review by The Eighth Circuit

On October 1, 1980, the Commission issued its second *Iowa Power* decision on reconsideration, dated September 29, 1980. (App. C) In that decision, the ICC vacated its prior July, 1979 decision and considered the agreement between BN and Iowa Power as a factor in determining the maximum reasonable rate. The Commission established the maximum reasonable rate at the agreed-to level of $5.62, including escalation. The Commission noted that the agreed-to rate was "in general harmony with Commission standards in determining the reasonableness of rates where rate agreements are not an issue." (C-10) With respect to the refund of payments made under the challenged rate which the Commission determined to be unreasonably high, the Commission noted that, because of the issuance of the preliminary injunction on February 12, 1980 in No. 79-1676 and the installment of the escrow account, the prior temporary restraining orders, and the Commission's own suspension of the rate increase, "it does not appear that BN has ever received any payments from IP&L in excess of the agreement rate. For this reason, no refund order is necessary in this decision." (C-15)

On October 14, 1980 BN filed a new petition for review of the Commission's second decision. The new petition was designated No. 80-1959, *Burlington Northern Inc. v.*

United States.[3] On that same day, the President signed the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 (1980) [Staggers Act].

On October 28, 1980, BN filed a Motion for Stay pending review of the Commission's October 1, 1980 decision. In that motion, BN declared:

> "While a stay would prevent irreparable harm to BN, it would not irreparably harm IP&L in any way. IP&L, because of a preliminary injunction authorized by this Court in *Iowa Power & Light Company v. Burlington Northern Inc.*, No. 79-1676 (8th Cir Feb. 12, 1980), has been paying the difference between the contract rate and the rate approved by the Commission into the Federal District Court for the Southern District of Iowa. *Because amounts in excess of the alleged contract rate are being held in escrow, IP&L would be able to collect any overpayments plus interest if, upon review, the Commission's October 1 decision were upheld.*" [Emphasis added]

On November 14, 1980, the Eighth Circuit denied BN's Motion for Stay. The Court also ruled that the monies paid by Iowa Power into the escrow account were to remain on deposit "until the further order of the court," and on its own motion consolidated the rehearing of No. 79-1676 with the judicial review of the ICC's October 1, 1980 decision in No. 80-1959. (A-27) Therefore, effective November 5, 1980, the rate was reduced to the agreed-to level as ordered by the ICC.

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[3] Iowa Power also filed Petitions for Review of the Commission's October 1, 1980 decision, which were designated as Nos. 80-1914 and 80-1915. Iowa Power later moved to withdraw these petitions, a motion granted by the Eighth Circuit. (A-28)

On April 27, 1981, the court of appeals issued the decision which is the subject of BN's Petition to this Court. (App. A) The Eighth Circuit denied BN's Petition for Review in No. 80-1959 and affirmed the Commission's decision concerning the maximum reasonable rate in all respects. The court ruled, as Iowa Power had argued in its brief, that certain sections of the Staggers Act did not apply to cases begun before the effective date of the Act and that it would be a manifest injustice under the standards of *Bradley v. School Board of the City of Richmond*, 416 U.S. 796 (1974), to apply the Staggers Act to this case. The Eighth Circuit also dismissed No. 79-1676 as moot.

On May 8, 1981, the Eighth Circuit ordered the escrowed monies to be repaid to Iowa Power upon issuance of the mandate. (App. B) On May 26, 1981, the BN filed a 28-page Petition to Vacate the Eighth Circuit's May 8 order, to which Iowa Power filed a substantial reply. On July 20, 1981, the Eighth Circuit denied BN's petition to vacate that May 8 order, and also denied BN's Petition for Rehearing of the court's April 27, 1981 decision. On August 17, 1981, the Eighth Circuit denied BN's motion to stay the issuance of the mandate, and ordered the mandate to issue on August 24, 1981. On August 20, 1981, the BN applied to the Honorable Harry A. Blackmun for a stay of the mandate pending petition for a writ of certiorari in No. A-143, to which Iowa Power replied on August 21, 1981. On August 21, 1981, Justice Blackmun denied the BN's application for stay.

REASONS FOR DENYING THE WRIT

On pages 11-12 of its Petition, BN argues that the decision of the Eighth Circuit is inconsistent with the prior rulings of this Court and other courts of appeals on certain general questions of law; that the holding of the Eighth

Circuit concerning the applicability of the Staggers Act is inconsistent with two district court decisions and that the same issue is pending before several other courts of appeals; and that review is necessary to effectuate the underlying policies of the Staggers Act.

BN's arguments are incorrect. The decision of the Eighth Circuit correctly interpreted the statute and applied settled precedent to the facts before the court. Moreover, in a recent decision in a virtually identical case the United States Court of Appeals for the Sixth Circuit adopted in every respect the holding and rationale of the Eighth Circuit on the first two issues presented by BN to this Court. Additionally, the class of cases even arguably encompassed by the Eighth Circuit's opinion is limited and closed, and even for those cases, the issues are not ripe for Supreme Court review. Finally, the Eighth Circuit's decision, far from frustrating the policies of the Staggers Act, is completely consistent with and furthers those policies.

A. The Decision of The Court of Appeals Correctly Interpreted The Statute and Applied Settled Precedent to The Facts Before The Court

The BN basically argues that the Eighth Circuit was wrong in three of its conclusions of law: (a) that the Staggers Act does not apply to a proceeding begun more than two years prior to the effective date of that Act; (b) that the Commission can consider rate agreements between shippers and carriers as evidence in determining a maximum reasonable rate; and (c) that the court is not prohibited from disbursing an escrow account established pursuant to its own order because of this Court's decision in *Arisona Grocery Co. v. Atchison, Topeka & S.F. Ry.*, 284 U.S. 370 (1932) [*Arizona Grocery*]. The BN's contentions are simply wrong and do not merit review by this Court.

Concerning the first argument, BN contends at page 14 of its Petition that the court of appeals acted contrary to the general principle that an appellate court must apply the law in effect at the time that it makes its decision, citing *Bradley v. School Board of the City of Richmond,* 416 U.S. 696 (1974) [*Bradley*]. BN misstates the governing principle. *Bradley* plainly teaches that "a court is to apply the law in effect at the time it renders its decision, *unless* doing so would result in manifest injustice *or* there is statutory direction or legislative history to the contrary." *Bradley,* 416 U.S. at 710, 716-722 [emphasis added]; see also, *Thorpe v. Housing Authority of the City of Durham,* 393 U.S. 268, 281-282 (1969). In the present case, the Eighth Circuit found that both of the qualifications to the general rule apply.

First, the court of appeals found that the very structure of the relevant Staggers Act amendments indicated that those provisions were intended to operate prospectively, that is, that the new jurisdictional "threshold" was to be applicable to cases begun on or after the effective date of the Act.[4] Moreover, the legislative history of the Staggers Act, far from indicating a sweeping intention to apply the new Act to all pending cases, stated unequivocally that existing case law should control the effect of the Act on pending cases. (A-11-12) Particularly in view of the complex precedent represented by *Bradley* and the other cases cited by the court of appeals, this approach required a far more careful analysis than the one-dimensional rule advocated by BN in its Petition. Such an analysis was in fact undertaken by the Eighth Circuit. (A-11-16)

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[4] The fact that the Commission may reconsider its prior finding of market dominance, as argued by BN at p. 16 of its Petition, does not vitiate the fact that by *requiring* a finding of market dominance within 90 days of the *start* of a proceeding under 49 U.S.C. § 10707, the Congress indicated, along with other factors, that the new jurisdictional thresholds were to apply to new cases only. Moreover, in this particular case, the Commission merely reaffirmed its finding of market dominance made two years earlier. (C-15)

Second, BN's attempt at page 17 of its Petition to read the "manifest injustice" exception out of *Bradley* by arguing that this exception applies only to changes in substantive law is not supported by the text of *Bradley* – which neither states nor implies anyuch limitation – nor by any subsequent decision of this Court or any of the court of appeals. Indeed, the only support that BN can garner for this novel position is a district court decision which does not even stand for the proposition advanced. In *Hospital Ass'n. of New York v. TOIA,* 435 F.Supp. 819, 831 (S.D.N.Y. 1977), the district court confronted a statute which the Congress *expressly* made retroactive (clearly *not* the situation here, as BN itself concedes, see BN Petition, p. 17). In the sentence before the one quoted by BN at p. 17 of its Petition, the Court noted that *Bradley* did not address such a situation, and that therefore *Bradley* was not relevant.

The BN's second argument, that the Commission cannot even consider a rail rate agreement as one factor in determining a maximum reasonable rate, is also clearly flawed for several reasons.

First, the Commission did not "enforce a contract" in its decision. As clearly recognized by the Court of Appeals, the Commission merely considered the agreement as evidence in determining a reasonable rate. (A-21)[5] As the court of appeals recognized, the ICC has done this for many years.[6]

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[5] Indeed, BN has recently conceded this very point. In a recent Memorandum to the U.S. Court of Appeals for the District of Columbia Circuit, the BN, referring to *this very Commission decision,* indicated "the Commission did not reach the question of whether the 'letter of understanding' is a binding contract. The letter was only one factor which the Commission considered in reaching its reasonableness determination." BN Memorandum in Support of Petition for a Writ of Mandamus, December 8, 1981, p. 21, *Burlington Northern Railroad Company v. Interstate Commerce Commission,* No. 80-2290 (D.C. Cir.).

Second, the decision of the Commission as affirmed by the court of appeals did not contravene the "filed rate" doctrine of *United Gas Pipeline Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956), or *Arkansas Louisiana Gas Co. v. Hall,*____U.S.____, 101 S.Ct. 2925 (1981), in any way. The agreement between BN and Iowa Power did *not* result in a "private rate agreement" not available to the public generally; it resulted in a *published tariff* in which any one could participate. Indeed, the essence of the ICC's decision was to order the carrier to cancel *unreasonably high tariffs* found to be unlawful and publish *new tariffs* to conform to the Commission's ruling with respect to a maximum reasonable rate. (C-16-17)

Finally, the court of appeals carefully read and properly distinguished the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Broadcasting Companies v. FCC,* 643 F.2d 818 (D.C. Cir. 1980) [*ABC*]. As recognized by the Eighth Circuit, *ABC* involved an attempt by a petitioner to argue that a private rate agreement must *control* the agency's determination of reasonable rates.[7] That was not the situation here, where the agency considered the rate as one factor in determining a maximum reasonable rate, and expressly found that the agreed-to rate was "in general harmony with Commission standards in determining the reasonableness of rates where rate agreements are not at issue." (C-10)

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[6] For example, in *H.P. Hood & Sons v. Delaware & Hudson Co.*, 17 I.C.C. 15, 18-19 (1909), the Commission noted that "[w]hen the parties thereto agree upon a rate, said agreement may be regarded as an admission as between the parties executing it of strong evidentiary value that the rate agreed upon is reasonable, and such evidence will be considered by the Commission together with all other facts, circumstances and conditions that may reasonably apply to the matters under investigation. . . " Similar statements are contained in the other cases cited by the court of appeals (A-19-20) as well as in other decisions, *e.g., McConville Coal Co. v. Iowa Southern Utilities Co.*, 172 I.C.C. 628, 632 (1931).

The BN's final argument, that the award of the escrow account to Iowa Power contravenes *Arizona Grocery,* is of no substance whatever. Indeed, as quoted at p. 8 *surpa* of this Brief in Opposition, the BN itself *conceded* in a Motion for Stay on October 28, 1980 that Iowa Power would be able to collect the escrowed monies if the Commission's decision was upheld. This Court's decision in *Arizona Grocery* is far different factually from this case, since the former case involved two different proceedings before the Commission rather than as here, a reconsideration in the same proceeding after judicial remand. *Arizona Grocery* by its terms applies to Commission action in a "subsequent proceeding," not to reconsideration in the *same* proceeding under 49 U.S.C. § 10327(g)(1). See, *Arizona Grocery,* 284 U.S. at 389. Moreover, in *Inland Steel Company v. United States,* 306 U.S. 153, 158 (1939), this Court expressly approved the use of an escrow fund while a dispute between a shipper and a carrier was being resolved by a court of appeals. At bottom, BN's argument is an attempt to prevent a court from disbursing monies paid by Iowa Power into an escrow account which was established by order of that court, which monies the Commission determined to be *in excess of the maximum reasonable rate.* Neither law nor equity permits BN to retain such funds.

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[7] As noted by BN on page 11 of its Petition, a case involving BN is now pending before the D.C. Circuit in which BN has made the same argument regarding the *ABC* case. *Burlington Northern Inc. v. United States,* No. 79-1547 (D.C. Cir.). Instead of Supreme Court review to determine what the D.C. Circuit meant by its decision in *ABC,* the better course would appear to be to let that court itself indicate the intent of its decision.

B. The Eighth Circuit's Decision Is Completely Consistent With The Decisions of Other Federal Courts; A Recent Decision of Another Court of Appeals in A Similar Case Has Adopted The Reasoning of The Eighth Circuit in Every Respect

At pages 11 and 18-19 of its Petition, BN argues that the Eighth Circuit's decision is also inconsistent with two district court decisions, citing the cases of *Metallurg, Inc. v. Burlington Northern Inc.,* No. 3-81 Civ. 39 (D. Minn., April 20, 1981), and *Cleveland Cliffs Iron Company v. Chicago & N.W. Transportation Co.,* 516 F.Supp. 399 (W.D. Mich. 1981), appeal pending, No. 81-1372 (6th Cir.). BN's arguments are again simply wrong. Both of these district court cases involved pre-Staggers Act rail rate agreements which were breached *after* October 1, 1980, in which there were *no* Commission proceeding pending on or before that date. The Eighth Circuit *specifically declined* to decide the effect of the Staggers Act in such cases. (A-10, 16). In the decision under consideration here, the Eighth Circuit merely held that the Staggers Act should not apply to cases pending at the Commission before October 1, 1980.

More significantly, on November 20, 1981, the United States Court of Appeals for the Sixth Circuit decided one of the pending cases noted by the BN on page 11 of its Petition, *Cleveland Cliffs Iron Company v. United States,* No. 79-3775 (6th Cir. November 20, 1981) [*Cleveland Cliffs*]. The decision is attached herein as Attachment A. That case involved a situation virtually *identical* to the one which the BN presents to this Court. In *Cleveland Cliffs,* the ICC had similarly considered a rail rate agreement as a factor in determining the maximum reasonable rate. The Sixth Circuit came to *precisely the same conclusions* as the Eighth Circuit, namely, that the relevant sections of the Staggers Act were intended to operate prospectively only, and that rail rate agreements can be considered by the Commission in determining a maximum reasonable rate. (See Attachment, A, pp. 36a-46a and 8a-10a.)

Thus, far from any inconsistency among the courts, the *only* other court of appeals to decide the same questions presented to the Eighth Circuit has reached *identical* conclusions on the same rationale. Inconsistency among the courts is not, therefore, a reason supporting review by this Court.

C. The Reasoning of The Eighth Circuit Applies to Only A Limited Number of Cases; Even for These Cases, The Issues Are Not Ripe for Supreme Court Review

BN implies at page 11 of its Petition that the issues raised by the railroad potentially involve large numbers of future cases. Exactly the opposite is true. The Eighth Circuit's opinion was narrow and carefully drawn. The issues raised by BN concerning the applicability of the Staggers Act and the lawfulness of the Commission's consideration of pre-Staggers Act agreements encompass only a limited number of cases whose class is closed.

Concerning the applicability of the Staggers Act, the Eighth Circuit merely held that the Staggers Act was not to apply to cases involving rail rate agreements which were begun before October 1, 1980 or in which the ninety-day period for determining market dominance was not pending on October 1, 1980. (A-11) In essence, the Eighth Circuit held that the ICC could decide cases involving rail rate agreements long pending before October 1, 1980 without reference to the Staggers Act. Since more than a year has passed since October 1, 1980, the Commission has presumably entered all such decisions.[8] Iowa Power is aware of only three other cases which fit such limited criteria.[9] Even if the reasoning of the Eighth Circuit regarding the applicability of the Staggers Act can be applied to cases not involving rail rate agreements pending at the Commission before October 1, 1980, it is still clear that such a universe involves a limited number of cases and is now closed.

Concerning the issue of Commission consideration of breaches of pre-Staggers Act rail rate agreements, the universe of possible cases is likewise small. Section 208 of the Staggers Act provided for a number of new procedures to govern rail rate contracts. See, 49 U.S.C. § 10713. Since new *post*-Staggers Act rail rate agreements are clearly governed by the new provisions of Section 208 of the Staggers Act, the only class of cases even arguably encompassed by the Eighth Circuit's decision is the class of pre-Staggers Act rate agreements which would be breached by one of the parties during the term of the agreement.[10] BN has not shown that there is any large number of such agreements, much less the likelihood of massive breaches.

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[8] Under 49 U.S.C. § 10707(b)(1) prior to October 1, 1980, the Commission was required to enter a decision in cases under Section 10707 in seven or ten months. Section 207 of the Staggers Act reduced this period to five or eight months.

[9] I.C.C. Docket No. 37135, *Increased Rates on Coal, BN, Montana to Superior, Wisconsin*, 362 I.C.C. 625 (1980), affirmed in part and remanded in part in *The Cleveland Cliffs Iron Company v. United States*, No. 79-3775 (6th Cir. November 20, 1981); ICC Docket No. 36970, *Annual Volume Rates on Coal, Wyoming to Flint Creek, Arkansas*, decision served February 4, 1981, appeal pending No. 79-1547 (D.C. Cir.); ICC Docket No. 37507, *Rates on Iron Ore, Randville to Escanaba via Iron Mountain*, decision served July 16, 1981, appeal pending No. 81-3413 (6th Cir.).

Moreover, even as to the limited number of cases which may be encompassed by the reasoning of the Eighth Circuit's decision , the BN has not shown how such cases are ripe for Supreme Court review at this time. Particularly in view of the fact that the Sixth Circuit in the attached *Cleveland Cliffs* decision has agreed with the Eighth Circuit in every respect, it seems likely that the courts of appeals will develop a consistent body of law governing this limited class of cases without the need for Supreme Court review. At the very least, unless and until there is shown to be a clear split in the circuits, the need for Supreme Court supervision does not appear.

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[10] Even as to this class, the Staggers Act may itself affect these cases. However, any issue concerning the effect of the Staggers Act on such agreements after October 1, 1980 was not decided by the Eighth Circuit and is not presented here. (A-21, note 22) It may be noted that the two district court decisions cited by the BN at pp. 18-19 of its brief, which *did* involve breaches of pre-Staggers Act agreements *after* the effective date of the Staggers Act, found that Section 208 of the Staggers Act, adding new section 10713(j) to the Interstate Commerce Act, "grandfathered" pre-Staggers Act rate agreements. See, *Mettalurg*, slip op. at 2-3; *Cleveland-Cliffs Iron Co. v. Chicago & N.W. Transportation Co.*, 516 F.Supp. at 403. However, as indicated, the Eighth Circuit did not reach this question and it is not presented here.

D. Review by The Supreme Court Is Not Necessary To Effectuate The Policies of The Staggers Act; Indeed, The Eighth Circuit's Decision Is Completely Consistent With Those Policies

At page 12 of its Petition, BN argues that review by the Supreme Court is necessary to effectuate the policies of the Staggers Act, in view of the substantial revenues involved. BN claims that the court of appeals' decision is directly at variance with the policies of the Staggers Act. Again, BN's arguments are flatly wrong. Even though the Eighth Circuit found that the Staggers Act was not applicable, the Commission's decision and the court of appeals' affirmance of that decision are completely in accord with the policies of the Staggers Act.

As noted above, Section 208 of the Staggers Act, 49 U.S.C. § 10713, clarifies that shippers and carriers may enter into contracts, and sets forth certain specific procedures and limitations. The Senate Report indicated that this provision was "one of the most important provisions in the bill," offering "great potential benefits to both carriers and shippers." Such rail rate agreements would "give railroads assured levels of revenues and assure shippers of specified levels of service at known rates." S. Rep. No. 96-470, 96th Cong., 1st Sess. 24 (1980). Similar statements were expressed by the House Committee. H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 57 (1980). Thus, Congress strongly *ratified* the Commission's conclusions in this decision concerning the importance and beneficial nature of rail rate agreements. (C-8-9; A-25)

The effect of the Commission's decision in this case was to establish as the maximum reasonable rate the rate *which BN* *itself agreed to* and which BN was attempting to breach. In view of the strong support in the Staggers Act given to rail rate agreements, the Commission's refusal to allow BN to renege on an agreement which enabled the railroad to capture the transportation of millions of tons of coal is completely in accord with the goals and policies of the Staggers Act.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LYNN K. VORBRICH
CURTIS L. RITLAND
666 Grand Avenue
Des Moines, Iowa 50309

*JOHN M. CLEARY
FREDERIC L. WOOD
NICHOLAS J. DiMICHAEL
DONELAN, CLEARY, WOOD
& MASER, P.C.
914 Washington Building
Washington, D.C. 20005
(202) 783-1215

Attorneys for Respondent Iowa Power & Light Company

**Counsel of Record upon whom service is to be made*

Nos. 79-3775, 79-3777, 80-3020, 80-3159, 80-3161

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE CLEVELAND CLIFFS IRON COMPANY, (79-3775, 80-3159), BURLINGTON NORTHERN, INC., (79-3777, 80-3020, 80-3161), *Petitioners,* v. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents,* THE CLEVELAND CLIFFS IRON COMPANY, BURLINGTON NORTHERN, INC., MINNESOTA POWER AND LIGHT, DETROIT EDISON COMPANY, *Intervenors.*	ON PETITION for Review of an Order of the Interstate Commerce Commission.

Decided and Filed November 20, 1981.

Before: ENGEL, KEITH and MERRITT, Circuit Judges.

ENGEL, Circuit Judge.

Burlington Northern, Inc. (BN) and the Cleveland Cliffs Iron Company (CC) seek review of a decision of the Interstate Commerce Commission, reported at 362 I.C.C. 625 (1980). That decision found BN's proposed freight rate increases to be "unreasonable" and set the maximum reasonable rates for three separate line movements at levels established in preexisting rate agreements which the Commission found to exist between BN and three individual shippers.

CC was one of these shippers. The two other shippers are utility companies, Minnesota Power & Light Company (MPL) and Detroit Edison Company (DE), both of whom have filed briefs as intervenors in support of the Commission's decision as it applies to their respective freight rates.[1]

I.

The facts regarding each shipper's business activities, its decision to purchase western coal, and to ship this coal on the BN railroad are set forth in detail in the Commission's decision. *See* 362 I.C.C. at 628-34. We briefly sumarize them here.

Minneapolis Power & Light Company generates and transmits electric energy within Minnesota. Before 1970, MPL purchased and burned bituminous coal mined in West Virginia and Kentucky. In 1967, MPL decided to construct a new 350,000 kilowatt generating unit in Cohasset, Minnesota, where it already had in operation two 70,000 kilowatt generating units. The new plant was designed to burn western coal, and the two existing units were converted to burn western coal. The coal is supplied by Peabody Coal Company under a long-term contract and is transported by BN.

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[1] Burlington Northern filed three separate petitions for review, all stemming from the ICC's decision finding the proposed rate increases to be unreasonable and setting the maximum reasonable rate. These petitions were filed sequentially and assigned docket numbers 79-3777, 80-3020 and 80-3161. Cleveland Cliffs filed two separate petitions for review, Nos. 79-3775 and 80-3159. All petitions were consolidated by order of this court on April 3, 1980. Both Detroit Edison and Minnesota Power & Light submitted briefs as intervenors in support of the ICC and United States of America and in opposition to Burlington Northern in consolidated cases Nos. 70-3777, 80-3020, and 80-3161. In addition, Burlington Northern submitted a brief as an intervenor in Nos. 79-3775 and 80-3159, responding to the brief of petitioner Cleveland Cliffs. Likewise, Cleveland Cliffs submitted a brief as an intervenor in Nos. 79-3777, 80-3020 and 80-3161, responding to the brief of petitioner Burlington Northern.

Detroit Edison generates and transmits electricity to Detroit and generally throughout southeastern Michigan. Until 1973, DE purchased and burned eastern coal. In the early 1970's it became interested in low-sulphur western coal because of EPA clean air standards. DE subsequently entered into a long-term contract with Decker Coal Company for the supply of western coal. BN provides rail transportation service.

Cleveland Cliffs manages four iron mines and five pelletizing plants located in the Upper Peninsula of Michigan. It also owns approximately 90% of the Upper Peninsula Generating Company and uses this company's electrical power to operate these mines. A 1974 expansion of mine operations required a corresponding increase in electrical generating capacity, and in 1975 CC began construction of three additional 80,000 kilowatt generating units designed to use low-sulphur western coal. CC contracted with various coal suppliers for western coal from Montana. BN provides rail transportation service.

In reaching a decision to construct new facilities or convert existing facilities to burn low-sulphur western coal, the shippers considered other options including the construction of plants that burned eastern coal and, in the case of MPL, the construction of a nuclear power plant. All three shippers entered into concurrent negotiations with coal companies and with BN (or its predecessor) for the supply and transportation of coal. In deciding to use western coal and to contract with western coal producers, each shipper reached an understanding with BN regarding the cost of transporting western coal to destinations in the Great Lakes region.[2] Each agreement contained a basic freight rate with a built-in escalation formula for future rate increases, as well as a "gross inequity" clause for rate adjustments where circumstances so required.[3]

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[2] Apart from these contractual commitments to western coal suppliers, the shippers also made substantial investments in electric generating equipment designed to burn western coal and facilities for receiving and handling the coal shipments. For example, DE acquired and paid for support facilities including a fleet of 600 rail cars, large lake vessels, coal dock and transfer facilities and generating facilities totaling approximately $500 million. CC entered into a 15-year agreement with Midwest Energy Resources Company for use of the Ortron facility at Superior.

After the coal supply commitments and investments had been made and the shippers were receiving the coal, BN initiated negotiations seeking rate increases beyond those established under the agreements (as determined by the escalation formula), relying upon the gross inequity clause. When the shippers resisted the proposed increases, BN published the higher tariffs with the ICC, thereby superseding the lower rates under the agreements.

Each shipper filed a complaint, and the ICC in each case began its own investigation into the reasonableness of the rate increases. The ICC initially determined that BN occupied a position of "market dominance" on the western rail routes involved.[4] On December 26, 1979, the ICC issued a brief final

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[3] One such "gross inequity" clause stated:

> It is the intent of BN and the shipper that the formula described above will compensate BN for any changes in the cost of transporting the shipper's coal tonnages above the . . . base index level. If either party should suffer a gross inequity as a result of the formula failing to fairly reflect cost changes, such inequities will be resolved by mutual agreement between BN and the shipper. Pending such agreement, neither party shall be relieved of its obligation as outlined in the current effective tariff and regular escalation shall continue using the above formula.

[4] Under section 202 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. No. 94-210, 90 Stat. 31, ("the 4R Act"), the ICC cannot declare a rate to be unjust or unreasonable unless it first finds that the carrier proposing the rate has "market dominance" over the service to which the proposed rate applies. 49 U.S.C. § 10709(b)(1) (1979 Supp. III). "Market dominance" is defined as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10709(a) (1979 Supp. III).

BN has not challenged the Commission's finding of market dominance. The BN lines involved generally originate in Montana and extend across North Dakota and Minnesota with different spurs connecting the main line with the several coal companies in Montana and the points of delivery for the three shippers.

MPL receives its coal from Peabody Coal Company's Big Sky Mine near Colstrip, Montana, pursuant to a 25-year coal supply contract due to expire in 1993. From this point BN transports the coal to decision finding BN's published rates not reasonable and ordering BN to cancel the proposed rates and to refund any monies collected in excess of previously established rates. This was the last day of the ICC's ten-month statutory deadline under 49 U.S.C. § 10707 (b) (1) (1979 Supp. III) for issuing a final decision. On March 10, 1980, the ICC issued a longer opinion explaining its decision of December 26 and establishing the maximum lawful freight rates at the levels found in the individual BN-shipper agreements as escalated pursuant to the built-in formulas. In reaching this decision, the ICC stated that it had considered the privately negotiated rate agreements in its reasonableness determination according to its new "contract rates" policy,[5] as well as the traditional criteria and cost analyses. It is this decision that we now review.

II.

We first address a preliminary jurisdictional matter raised by the railroad. BN argues that by deferring until March 10, 1980, the issuance of its final explanation of the December 26, 1979 decision, the ICC violated the ten-month deadline for a final decision imposed by 49 U.S.C. § 10707 (b) (1); therefore, BN argues the ICC acted unlawfully and without jurisdiction when it declared the rates unreasonable. BN also claims

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Cohasset, Minnesota. BN is the only rail carrier serving both Colstrip and Cohasset.

DE receives coal from the Decker Coal Company's mine located near Colstrip, Montana, pursuant to a 26-year coal supply contract due to expire in 2001. From Colstrip, BN ships the coal to Superior, Wisconsin, where it is loaded onto lake barges for movement through Lake Superior and Lake Huron and eventual delivery to St. Clair in southeastern Michigan. BN is the rail carrier for this line.

CC receives its coal from three different sources located in Montana. In 1977 CC entered into 6-year coal supply contracts with DE, Western Energy Company and Westmoreland Resources, each due to expire in 1983. BN transports coal from Decker, Colstrip and Kuehn to Superior, Wisconsin, where it is loaded onto lake barges and shipped to Marquette, Michigan. BN is the sole rail carrier for this line.

[5] ICC Ex Parte No. 358-F, "Change of Policy — Railroad Contract Rates" (decided February 21, 1980).

that the ICC was without authority to order a refund of monies collected.

Despite BN's protests to the contrary, we find that the ICC acted properly. Its December 26, 1979 decision was final and appealable, declaring that BN's proposed tariffs were not reasonable. While certainly it would have been preferable for the Commission to have published its entire decision on December 26,[6] we are unable to read the statute as imposing any jurisdictional bar to ICC or judicial review due to the Commission's failure to do so. Even if we assumed the final decision did not come until March 10, 1980, under 49 U.S.C. § 10707 the only consequence of failing to meet the ten-month period is that the rate, if suspended, becomes effective. Under subsection 10707(b)(2): "If an interested party has filed a complaint under subsection (a) of this section [as the shippers in this case did], the Commission may set aside a rate . . . that has become effective under this section if the Commission finds it to be in violation of this chapter." Thus, the Interstate Commerce Act itself clearly allows the Commission to set aside a rate that has become effective if that rate is later found to be unlawful. *See Houston Lighting & Power Co.* v. *United States,* 606 F.2d 1131, 1142 (D.C. Cir. 1979), *cert. denied,* 100 S.Ct. 1019 (1980). Moreover, 49 U.S.C. § 11701 authorizes the ICC to begin an investigation on its own initiative and requires the Commission to complete the investigation within three years. Only if the ICC fails to meet this deadline is the investigation "dismissed automatically." 49 U.S.C. § 11701(c). The Commission's investigation did not contravene this deadline.

Finally, the Commission was not precluded from ordering a refund in this case. We first note that the December 26, 1979 final decision explicitly ordered BN to refund any funds collected under the rate proposals that were declared unlawful. This action concededly fell within the statutory deadline. The refund order subsequently was stayed at the behest of BN.

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[6] We recognize that the practice followed here is subject to some criticism. The December 26 decision, although subject to a petition for review, would have been particularly difficult to challenge if the petitioner had been limited to the findings of the Commission made at that time. However, this potential disadvantage was avoided by the Commission's relatively prompt explanation of its December 26 decision, issued less than three months later.

BN admits that the Commission's refund power is coextensive with the Commission's authority to declare rates unreasonable. Nothing in section 10707 indicates that the Commission is divested of refund authority as long as it retains the power to investigate and declare the rate unreasonable. In fact, if a rate is not suspended, 49 U.S.C. § 10707(d)(1) requires the Commission to order a refund of amounts collected under an unreasonable rate when final action is taken. Since we find that the March 10, 1980 decision was valid, the ICC's refund order attending that decision was also valid, particularly in light of the prior refund order in the December 26 decision.

III.

The "contract rates policy" which the ICC applied in each of these rate disputes was first formally announced on November 9, 1978. It was followed by an additional statement on April 10, 1979, and finally set forth in a statement dated February 21, 1980. Because of its importance to the decision here, it is reproduced in full as Attachment A.

Basically, the contract rates policy announced that the ICC would take notice of and give evidentiary weight to privately negotiated rate agreements when determining the reasonableness of a proposed rate filed with the Commission.[7] The policy statement distinguishes between those privately negotiated agreements entered into before the November 9, 1978 policy statement and those entered into after that date:

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[7] Prior to the policy statement, there was some confusion surrounding the legality of private rate agreements and the weight to be accorded such agreements vis-a-vis the ICC's statutory responsibility under the Interstate Commerce Act to determine the reasonableness of rates for rail transportation.

> In regard to contracts entered into after issuance of the Commission's November 9, 1978 policy statement . . ., we will view the existence of such a contract as creating a presumption that a proposed rate change in excess of the contract rate is unreasonable in violation of the Interstate Commerce Act. However, there may be unusual and compelling circumstances which would rebut this presumption and warrant our upholding a rate change in excess of a contract rate.
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> * * *
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> [W]ith respect to agreements entered into before our 1978 policy statement, the Commission will weigh the alleged agreement, together with all other factors bearing on the reasonableness of the proposed rate. Consideration of these factors may lead us to prescribe or approve a rate within a range from the contract rate to the maximum reasonable rate that would apply in the absence of a contract.

Interstate Commerce Commission, Ex Parte No. 358-F "Change of Policy, Railroad Contract Rates" (decided February 21, 1980), Attachment A at pp. 4, 6.

BN asserts that the ICC violated the language and intent of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (hereinafter referred to as the "4R Act") by enforcing what it conceived to be binding contracts between BN and the various shippers. This was improper, it claims, because there were in fact no contracts to be enforced. Specifically, BN argues that (1) there were no actual contractual instruments, (2) there was an absence of mutual obligation between BN and each shipper because the shippers were not bound to transport specific amounts of coal at any particular time, and (3) there was no intent to be bound by the alleged agreements since the parties knew that contracts were *per se* illegal, according to the Commission's decision in *Guaranteed Rates, Sault Ste. Marie, Ontario to Chicago,* 315 I.C.C. 311 (1961).

These arguments are not persuasive. The Commission did not find that the agreements between BN and the shippers were "contracts" to be enforced as such as a matter of contract law. Instead, the Commission applied the agreements in a more limited fashion. It was sufficient, in the view of the ICC, to find that the parties intended to set the freight rates by mutual agreement and that each of the shippers relied upon those rates in deciding to use western coal instead of some other energy source. We respect the Commission's effort to confine itself to considering these factors in an evidentiary fashion, without endeavoring to make a judicial or legal analysis of all the elements associated with formal contract formation and performance under the law of contracts. *See Increased Rates on Coal, Burlington Northern, Inc. Montana to Superior, Wisconsin,* Docket No. 37135 (decided April 4, 1980). At least with respect to agreements existing before the issuance of the first policy statement in 1978, the ICC has determined that it would give them great but not controlling weight if it was satisfied that (1) the parties intended to be bound by the agreement, (2) the shipper reasonably relied on the contract to its substantial detriment, and (3) public interest considerations warrant holding the parties to the agreement.

There is substantial evidence in the record to support the Commission's finding that the parties intended that the agreement should govern the freight rates between them and that each of the shippers did, in fact, rely upon the agreement in committing itself to ship coal across the particular rail lines at the established rates. As noted in the ICC's decision, BN entered into extensive negotiations seeking an acceptable base freight rate. The parties exchanged a considerable amount of documentation and settled upon an escalation formula to govern future rate increases. These certainly were not empty gestures.

Contrary to the petitioners' claims, contract rates were never clearly illegal *per se.* Since *H. P. Hood & Sons* v. *Delaware & Hudson Co.*, 17 I.C.C. 15 (1909), the ICC has given at least some consideration to privately negotiated contracts between shippers and rail carriers. *See e.g., C. A. Wagner Construction Co.* v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 219 I.C.C. 317 (1936); *Booth & Olson, Inc.* v. *Chicago, Burlington & Quincy R.R. Co.*, 222 I.C.C. 569 (1937); *Ideal Cement Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 280 I.C.C. 55 (1951). A fair summary of ICC's historic perspective on private agreements is found in *McConville Coal Co.* v. *Iowa Southern Utilities Co.*, 172 I.C.C. 627, 632 (1931):

> The Commission will not undertake to enforce, interpret, or determine the legal effect of an agreement, nor will it be bound thereby in the determination of the question in this case. The promise may, however, be regarded as of evidentiary value, to be considered together with all other facts, circumstances, and conditions, that may reasonably apply to the situation under investigation. *H. P. Hood & Sons* v. *Delaware & Hudson Co.*, 17 I.C.C. 15.

With respect to *Guaranteed Rates, supra,* its language regarding the illegality of privately negotiated contracts was primarily dictum to which only four members of the Commission agreed. Moreover, that case presented a peculiar factual situation in which the ICC was called upon to review an anticompetitive contract restraining competition between carriers.[8]

BN also asserts that the application of the contract rates policy to this case violates section 4 of the Administrative

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[8] A similar argument was made by BN and rejected by the court in *Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981). We agree, however, with the conclusion of the Eighth Circuit that, at least in the absence of any secret or preferential private agreement raising other implications violative of the Interstate Commerce Act, the Commission's consideration of such agreements as evidence bearing on the reasonableness of rates was not erroneous as a matter of law.

BN also claims that certain 1979 ICC decisions indicated that contract rates would be accorded no weight in rate reasonableness de-

Procedure Act, 5 U.S.C. § 553 (1976), because the ICC failed to engage in a rule-making proceeding before establishing the policy. We agree with the Eighth Circuit in *Iowa Power & Light Co.* v. *Burlington Northern, Inc.*, 647 F.2d 796, (8th Cir. 1981), that the claim is without merit. *See* 647 F.2d at 811. The APA defines a "rule" which is subject to the rule-making procedures of the Act as:

> The whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy, or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates.

5 U.S.C. §551(4). On the other hand, a "policy statement," exempt from rule-making, has been defined as a statement issued to "advise the public prospectively of the manner in which the agency propose[s] to exercise a discretionary power." Attorney General, *Manual on the Administrative Procedure Act*, at 30 n.43 (1947). The contract rates policy statement involved here clearly is intended to apply, although to a more limited extent, to rate agreements which were in effect before the statement was first promulgated, and it is on the basis that BN claims that it cannot be considered a general policy statement exempt from the APA rule-making procedure.

In determining whether an agency statement qualified as a policy statement or as a binding rule, the courts generally have employed two criteria:

> First, courts have said that, unless a pronouncement acts prospectively, it is a binding norm.

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terminations. *See Annual Volume Rates on Coal-Wyoming to Flint Creek, Arkansas*, No. 36970 (served May 25, 1979); *Unit Train Rates on Coal-Burlington Northern, Inc.*, 361 I.C.C. 688 (1979). However, neither BN's nor the shippers' intent to be bound by their agreements could depend on those decisions since their agreements pre-dated three ICC decisions.

> The second criterion is whether a purported policy statement genuinely leaves the agency and its decision- makers free to exercise discretion.
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> * * *
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> . . . If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is – a binding rule of substantive law.

American Bus Association v. *United States,* 627 F.2d 525, 529 (D.C. Cir. 1980) (citations omitted). In *American Bus,* the D.C. Circuit inquired whether the alleged policy statement was "'finally determinative of the issues or rights to which it was addressed.'" *Id.* at 531. The court first looked to the language of the policy statement and found that "nothing in it even hints to those who will apply the statement that they may exercise any discretion in doing so." *Id.* at 532. The court further found that the statement was "not 'simply a general pronouncement of the broad policy considerations which will motivate the Commission as it addresses itself to its appointed tasks . . .' but rather, 'is in reality a flat rule of eligibility.'" *Id.* at 531-32.

Comparing the language of the contract rates policy statement which appears in Attachment A, with the criteria set forth in *American Bus,* we are of the opinion that to the extent that the policy statement announces the ICC's intention to accord weight to pre-1978 agreements, it cannot be said to impose a flat rule inflexibly governing the exercise of Commission discretion.[9] Given the history of the Commission's authority over railroad rates, its responsibility under the 4R Act to make an independent determination of rate reasonableness, and the fact that private agreements have been accorded evidentiary value in numerous past ICC decisions, we conclude that the contract rates policy statement imposes no new obligations which might invoke the requirement or rule-making under the APA. "The statement in no way established a binding norm for future rate cases, but instead left the Commission free to exercise considerable discretion in considering whether, and to what extent, to enforce contracts prior to 1978." *Iowa Power & Light, supra,* 647 F.2d at 811-12.

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[9] We need not decide here the effect of the policy upon private agreements entered into after November 9, 1978, or the creation therein of presumptions of unreasonableness with respect to freight rates that do not conform to the contract rate. We note that according to the policy statement of February 21, 1980, the Commission intended to institute rule-making proceedings which would propose substantive and procedural requirements for contract rates. Those rules are, of course, not before us here. *See* Ex Parte No. 358-F, *supra,* Attachment A at p. 50.

BN still maintains that the retroactive application of the contract rates policy to the agreements is arbitrary and capricious, in violation of section 10(e) of the APA, 5 U.S.C. § 706, since the Commission failed to consider and weigh the benefits of retroactive application against the adverse effects on private interests. BN further claims that retroactive application has precluded it from submitting evidence and arguments concerning the applicability of the contract rates policy to the current rate dispute, again in violation of sections 5 and 7 of the APA, 5 U.S.C. §§ 554, 556. In this respect, BN relies upon *Port Terminal Railroad Assn.* v. *United States*, 551 F.2d 1336 (5th Cir. 1977), and *Hill* v. *FPC*, 335 F.2d 355 (5th Cir. 1964), and argues that the ICC, by imposing new ratemaking standards without notice to the parties, deprived it of a fair hearing.

In *NLRB* v. *E & W Brewing Co.*, 276 F.2d 594, 600 (6th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961), our court held that retroactive application of a change of policy should not occur where it will "work hardship upon a party altogether out of proportion to the public ends to be accomplished," *citing NLRB* v. *Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952). At the same time the court observed: "It is not suggested that under no circumstances may an administrative ruling apply retroactively. . . . [A]ny 'case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency.'" 276 F.2d at 600. These principles were in turn recognized by the D.C. Circuit in *Retail, Wholesale and Department Store Union* v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972), which articulated the following considerations that should govern any determination to apply new administrative standards and rules retroactively:

> (1) whether the particular case is one of first impression;
> (2) whether the new rule represents an abrupt departure from well established practice;
> (3) the extent to which the party against whom the new rule is applied relied on the former rule;
> (4) the degree of the burden which a retroactive order imposes on a party; and
> (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. at 390. With respect to the hearings in the joint investigatory proceedings and with respect at least to its decision as it affected MPL and DE, the Commission did not err in retroactively applying the policy statement. First, the record indicates that during the administrative proceedings BN presented evidence and argument regarding the existence of and effect to be given the rate agreements. Furthermore, since we have found substantial evidence in the record that BN intended to be bound by the agreements, it was not an abuse of discretion or arbitrary for the Commission to accord those agreements weight, pursuant to its contract rates policy, in reaching its decision as to the reasonableness of BN's proposed rate increases.[10] Retroactive application did not impose a hardship on BN that was out of proportion to the public purpose sought. *Accord, Iowa Light & Power Co., supra,* 647 F.2d at 812.

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[10] As discussed below, while we are of the opinion that it was entirely proper for the ICC to scrutinize each BN-shipper rate agreement under the contract rates policy, we are obliged to conclude that with respect to the rates approved for CC's Colstrip and Kuehn movements, the plain language of the ICC's March 10 decision indicates that the Commission failed to follow its own policy and apparently, for all practical purposes, accorded conclusive binding effect to the agreement.

In summary, we conclude, as a general matter, that it was neither unlawful nor an abuse of discretion for the ICC to have applied its policy statement in making its reasonableness determination in each of the three cases. The issue then becomes whether the policy was properly applied in each case or whether the ICC violated its statutory responsibility under the Interstate Commerce Act, as amended by the 4R Act.

IV.

As noted above, the contract rates policy states that, with respect to private rate agreements entered into before the 1978 policy statement, the Commission will weigh the alleged agreement with all other factors bearing on the reasonableness of the proposed rate, including the public interest. The Commission observed: "Consideration of these factors may lead us to prescribe or approve a rate within a range from the contract rate to the maximum reasonable rate that would apply in the absence of a contract." ICC, Ex Parte No. 358-F, *supra,* Attachment A at p. 6. The foregoing language of the policy statement assured flexible application and avoided any conflict with the APA's rule-making requirements. This language convinces us that, at least with respect to the consideration of rate agreements pre-dating the 1978 policy statement, the ICC did not intend to shirk its responsibility to investigate independently the reasonableness of rates. The policy statement obliges the Commission not only to consider the alleged agreement, but "all other factors bearing on the reasonableness of the proposed rate," ICC, Ex Parte No. 358-F, *supra,* Attachment A at p. 6. The Commission still operated under the traditional statutory duty to protect shippers, and consequently the public, against rates which for one reason or another were found to be unreasonably high, particularly where the carrier enjoyed "market dominance" over the line movement or where the purchaser of rail service could be characterized as a "captive shipper."[11]

While we therefore conclude that it was appropriate for the Commission to have promulgated its policy statement as it did, we likewise conclude that such a policy could not and was not intended to supplant the Commission's normal responsibilities under the statute to determine rate reasonableness both from the point of view of the specific carrier and shipper, as well as the general public interest. It also follows that our court is not relieved of the obligation of reviewing the underlying record, at least to the extent necessary to determine that the Commission's enforcement of the agreed rate was not arbitrary and capricious and did not amount to an abdication of its general responsibilities under the Interstate Commerce Act at the time.

BN contends that the ICC failed to adhere to the ratemaking standards articulated in the 4R Act and failed to set a rate that accorded the railroad adequate revenue and a proper rate of return on capital investments.[12] On the other hand, CC claims that the ICC abdicated its independent duty to investigate and set maximum reasonable freight rates in order to protect the general public interest as well as the specific interests of the individual shipper and carrier. We conclude that, with respect to the rates set for the BN-MPL and BN-DE line movements, the ICC carried out its statutory responsibility. However, with respect to its decision regarding the two separate BN-CC rates, we conclude that the ICC abdicated its independent review responsibility under the Interstate Commerce Act as it existed at the time, and therefore its determination cannot stand.

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[11] *See Unit Train Rates on Coal-Burlington Northern, Inc.*, I & S No. 9199, (decided September 29, 1980). There again, the ICC had under consideration an understanding between BN and a shipper. In deciding whether to prescribe the rate when applying its contract rates policy, the ICC articulated several factors that were included in its "public interest" element of this new policy. It stated:

> A final public interest consideration is whether enforcement of the base rate and escalation formula in the BN-IP&L agreement will . . . otherwise contravene Commission standards for determining rate reasonableness.
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> * * *
>
> The cost evidence indicates that enforcement of this agreement will not result in a gross inequity to either BN or IP&L and will be *in general harmony with Commission standards in determining the reasonableness of rates where rate agreements are not in issue.*

Id. at 193-94 (emphasis added).

[12] BN made this argument in conjunction with its claim that the ICC merely enforced the alleged agreements between BN and the

In reviewing the reasonableness of the rates for each of the three shippers, the Commission received and considered the same evidence and made the same factual determinations that would have been made in determining questions of reasonableness where no contract agreement was in issue. Published with its opinion were detailed analyses of the cost of service data submitted by BN and the three shippers. While specific complaints with respect to certain methods of cost analysis will be addressed later, it is sufficient for our purpose here to observe that if the statistical data and the ICC's conclusions concerning reasonableness are supported by the record, then the rates established by the BN-MPL and BN-DE agreements were consistent with those rates which would otherwise have been considered reasonable and lawful rates had such agreements not existed.[13] Contrary to BN's claim, the Commission performed a meticulous review of the cost of service and financial evidence. *See* 362 I.C.C. 625, 647-99

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three shippers. We have already disposed of this question, *see ante* at 8-9, and we now deal with the broader question of the ICC's statutory rate-making duties.

[13] For the MPL unit-train coal movement, the ICC found the fully allocated cost to be $6.68 per ton. The rate established under the BN-MPL agreement, as increased pursuant to the built-in escalation formula, was $6.76 per ton (minimum annual volume of 1.75 million tons) or $7.14 per ton (minimum annual volume of 1.5 million tons). For the DE unit-train coal movement, the ICC found the fully allocated cost to be $7.24 per ton. The rate established under the BN-DE agreement, as increased pursuant to the built-in escalation formula, was $7.45 per ton.

(1980). There is substantial evidence in the record that the Commission was concerned with BN's rate of return on capital investments and its need to raise revenue. That the ICC did not readily accept certain portions of BN's cost evidence does not, in itself, indicate that the ICC failed to abide by the 4R Act's rate-making policy considerations and standards. Therefore unless there is some serious error in the Commission's factual findings in these two instances, we conclude that the ICC did not fail to adhere to the rate-making standards under the 4R Act.

The same conclusion, however, cannot be made with respect to the Commission's determination of rates for the BN-CC movements from Colstrip and Kuehn, Montana. CC's principal argument is that the ICC merely considered and adopted the rate agreement existing between BN and CC in reaching its reasonableness determination. While CC acknowledges that the ICC has authority to consider the rate agreement when reaching its determination, it argues with great reason that the Commission cannot rely solely upon that agreement, but must consider other factors — specifically the protection of the public interest, avoidance of discriminatory treatment (a discrimination which it asserts exists in this case due to the disparate rates between the shippers), and the protection of the shipper from rates that result in an unduly high or unjustified level of return for the market dominant carrier.

Unlike the decision in the BN-MPL and BN-DE rate cases, the adoption of the BN-CC contract rates, pursuant to the strict application of the contract rates policy, leads to inconsistent results. This is most clearly evidenced by the Commission's own opinion:

> If BN had not filed the increases under investigation, the annual escalation formula of its letter of understanding with CC would have produced a July 1, 1979, rate of $10.03 per ton. The rates which the Commission would

> have found to be reasonable rates based on costs plus the seven percent additive ($6.74 per ton from Kuehn and $6.59 from Colstrip) in absence of a letter of agreement, would have been lower than the rate agreed to by the shippers ($10.03 per ton from each origin) and lower than the proposed rate ($11.23 per ton) which is under investigation.

362 I.C.C. at 641. Nevertheless, the ICC decided to hold to the BN-CC agreed rate as escalated, stating:

> Although the rate increases under investigation on the CC movements are of a lesser magnitude than the increases applied to the MP & L and DE movements, our restatements of costs for these movements show the assailed increases to be completely unwarranted. We do not, however, believe that prescription of a maximum reasonable rate below the escalated letter-of-understanding rate would be proper. CC studied the delivered cost of both eastern and western low-sulphur coal before it signed the letter of agreement with BN. Its study showed that the delivered price of eastern and western coal would be approximately equal. CC specifically states that it decided to purchase Montana coal to be moved by BN on the assumption that the rates and annual escalation formula offered by BN and the economics of mining western coal would produce lower overall fuel costs in the future. It signed the letter of agreement with full knowledge that its rates were substantially higher than rates applicable to the MP & L and DE movements. CC certainly relied on the letter of understanding when it entered into three contracts to purchase coal and a contract for use of the Ortran dock facilities of Superior. On the other hand, CC has submitted testimony that the letter of understanding with BN was "negotiated at arm's length and * * * provided significant benefits to both parties." . . .
>
> We believe these parties should continue to receive the benefits of their agreement. Considering the cost evi-

> dence of record and the circumstances surrounding the letter of understanding between BN and CC, we conclude that the maximum reasonable rate for the Kuehn and Colstrip to Superior movements is the rate in effect prior to February 25, 1979, as escalated under the annual escalation formula of this letter of understanding.

Id. at 641-42.

Thus, the ICC determined that BN's proposed increases for the CC traffic were completely unwarranted on the basis of the cost evidence. Further, the ICC appears to have made a determination that at the time in question a rate of $6.74 per ton from Kuehn and $6.59 per ton from Colstrip would have been reasonable. Beyond this, however, there is nothing to indicate, as a matter of cost analysis, that the rate finally approved (i.e., $10.03 per ton from each origin) was itself reasonable, or that it fell within the "zone of reasonableness," other than as might be inferred from the fact that CC had agreed to it. In fact, there is much to support a conclusion that it was not reasonable, if one at least compares that rate with the substantially lower rates approved for DE and MPL.[14] Most important, the Commission itself acknowledged that the rate it would have found reasonable absent the BN-CC agreement would have been substantially lower. In *Unit Train Rates on Coal-Burlington Northern, Inc.*, I & S No. 9199, (decided September 29, 1980), the Commission explicitly acknowledged that traditional reasonableness standards were an important factor in its "public interest" analysis under the new policy. Yet the Commission's decision here is quite the opposite.

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[14] The Commission found that BN's proposed rate increases "to be completely unwarranted" based on the Commission's restatement of costs. Yet, BN's proposed increase ($11.23 per ton) was not much higher than the agreed rate eventually adopted by the Commission ($10.03 per ton) which, in turn, appears to be completely unwarranted in light of the cost evidence ($6.30 and $6.16 per ton respectively for the Kuehn and Colstrip unit-train coal movements). We also note in passing that BN's proposed rate increases for the BN-MPL and BN-DE unit-train coal movements ($10.43 per ton and $10.15 per ton respectively) were found to be unlawful by the Commission. Yet, both of these increases approximate $10.03 per ton rate approved for CC. Furthermore, the fully allocated cost of service on the BN-CC line was noticeably *lower* than the fully allocated costs for the BN-MPL and BN-DE line movements.

In short, we conclude that the ICC, in applying its contract rates policy in the BN-CC rate case, abdicated its independent review responsibility under the Interstate Commerce Act. The ICC has done precisely what its policy statement said would not be done with respect to rates which were agreed upon before November 1978; it has given them almost conclusively presumptive effect. Not only is this in violation of its own policy statement[15] but such an application would, especially where made retroactive, raise serious questions regarding the need for rule-making under the APA. That portion of the ICC decision therefore must be vacated and the cause remanded for further proceedings, consistent with this opinion, regarding the BN-CC freight rates for coal from Kuehn and Colstrip, Montana. In doing so, however, we are obliged to review objections made by both BN and CC concerning certain alleged errors in the Commission's cost analysis. We note at the outset that courts traditionally have

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[15] In its February 21, 1980 contract rates policy statement, the ICC expressly stated:

> In sum, with respect to agreements entered into before our 1978 policy statement, the Commission will weigh the alleged agreement, together with all other factors bearing on the reasonableness of the proposed rate. Consideration of these factors may lead us to prescribe or approve a rate within a range from the contract rate to the maximum reasonable rate that would apply in the absence of a contract.

Ex Parte No. 358-F, *supra*, Attachment A at pp. 50-51. Although this language is somewhat ambiguous and could be construed to be consistent with the ICC's action here, we do not believe that ICC or judicial precedent would permit the Commission to use its contract rates policy in such a manner as to prescribe a contract rate that is far above the maximum reasonable rate absent the agreement. This might conflict with prior cases holding that private parties cannot themselves set an unreasonable rate. *See e.g., Unit Train Rates*, I & S No. 9199, *supra*.

In its brief, the ICC contends that it properly upheld the BN-CC agreement rate because "the uniformity and evenhanded application of the policy is as important as the policy itself. If the Commission did not apply its contract rate policy even-handedly, it would be applied deferential standards in reviewing rate determinations by any agency that possesses expertise to analyze complicated ecomomic data. *Atchison, Topeka & Santa Fe Railway* v. *Witchita Board of Trade*, 412 U.S. 800 (1973). Nevertheless, the courts retain authority to review agency decisions and to determine whether those decisions comport with applicable law, whether they are supported by the evidence, and whether the rationale employed is both discernible and defensible. *San Antonio, Texas* v. *United States*, 631 F.2d 831, 836 (D.C. Cir. 1980).

V.

BN maintains that the Commission committed three specific accounting errors, all of which led to an understatement of its cost of service and need for revenue, and therefore, to an erroneous decision as to the reasonableness of the proposed rate. First, BN claims that the Commission improperly excluded all capital costs of pre-1977 roadway investments (listed in Rail Form A) from its variable and fully allocated cost analysis. To understand this claim, it is necessary to examine the nature of Rail Form A[16] as a method employed by the ICC for determining the appropriate investment base for calcu-

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subject to a charge of patent arbitrariness." *ICC Brief* at 50. Furthermore, it argued that "[t]he Commission properly declined to substitute its business judgment for that of the shipper." *ICC Brief* at 51.

These arguments miss the point. Surely the ICC was duty bound to scrutinize each of the BN-shipper agreements under its contract rates policy. Yet, the process of applying the policy does not require the ICC to adopt the agreed rate in each instance. The point is that substantial rate differences did exist under the agreements despite a similarity of costs; this led the ICC to conclude that the BN-CC rate should have been lower absent the agreement. The "evenhanded" adherence to the contract rate in each case actually resulted in unequal treatment. The fact that the ICC should not substitute its "business judgment" for that of the parties does not relieve it of its obligation to make an independent review of rate reasonableness. *See e.g., Unit Train Rates*, I & S No. 9199, *supra*, and discussion n. 11 *supra*. To argue otherwise would make a nullity of the regulatory scheme under the Interstate Commerce Act.

[16] Rail Form A (Statement IFI-73) "Formula for Use in Determining Rail Freight Service Costs" (1973).

lating costs to be covered by a particular rate proposal. "Rail Form A is a cost accounting procedure that allocates actual expenditures to various rail services. RFA procedures distinguish between variable and constant portions of each expense account." *Annual Volume Rates on Coal-Wyoming to Flint Creek, Arkansas,* (decided May 30, 1980), p. 6. Among the costs that can be allocated proportionately by this formula are BN's fixed plant investment costs.

In determining costs for the particular freight movements under review (and thus, the reasonableness of BN's proposed rates to cover these costs), the ICC indicated that it would allow the railroad a return on the road property listed in Rail Form A since the said coal traffic, to some extent, uses existing roadway investments included in the Rail Form A property.[17] However, since the rate determinations focus on the cost of this particular type of coal haulage and seek to establish a rate to cover this cost, the ICC also indicated that the Rail Form A investment figures must exclude all coal-related fixed plant investments allowed as rate additives and recovered by rate increases in prior years. These investments had to be removed from the Rail Form A systemwide accounts. Otherwise a cost analysis which used the unadjusted Rail Form A would inevitably result in a "double-counting," authorizing a rate that covered costs which had already been reflected in prior rate determinations. *See San Antonio, supra,* 631 F.2d at 842. The difficulty with the Rail Form A submitted by BN in this case was noted by the Commission:

> In this proceeding, CC notes that defendant admits that all 1976 coal-related investments were not removed from its Rail Form A return on road property and will, in this proceeding, result in a double-counting of some incremental fixed plant additives previously charged in other traffics. Inasmuch as the evidence of record precludes our

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[17] In this case, Rail Form A included system-wide investments as of 1977 indexed to reflect cost levels at the beginning of 1979.

> restatement of this deficiency, we have disallowed, *in its entirety*, the return on existing road property as computed in Rail Form A.

362 I.C.C. at 657.

BN argues that the ICC erred in relying upon the testimony of CC's witness and claims that the operative expense portion as well as the capital portion of coal-related incremental capital expenditures for the entire BN system had been removed from Rail Form A. This claim, however, is contested by MPL and CC, both pointing out that one of the forms BN had filed previously with the Securities and Exchange Commission (Form 10-K) indicates capital expenditures on coal-related traffic of $154 million, while according to BN's own witness only $128 million in capital investments had been removed from Rail Form A for the same years.

Our review satisfies us that there was substantial evidence and a discernible rationale to support the ICC's conclusion that not all coal-related expenses were removed from the 1976 Rail Form A accounts. BN's own witnesses appeared uncertain regarding the accuracy of the Rail Form A calculations. BN's economic expert stated that he did not know the actual coal-related expense numbers for 1976 and indicated that the procedures used for 1977 Rail Form A calculations were different from those used in 1976. At one point he acknowledged that the 1976 Rail Form A expenses would have been lower if the 1977 procedures had been applied properly. While BN contends that subsequent testimony demonstrates that any initial mistakes had been corrected, the testimony is ambiguous. The ICC could reasonably conclude that only Rail Form A 1976 accounts were corrected in part and that the form calculations still included investments which had already been recovered by other rate additives. As a result, the ICC disallowed the return in its entirety because "the evidence of record precludes our restatement of this deficiency." 362 I.C.C. at 657. In other words, the ICC was unable to ascertain the amount which BN had failed to remove from Rail Form A and thus operated as a potential double-recovery. In such circumstances, we are unable to hold that the ICC erred in disregarding all Rail Form A investments.

BN next contends that the Commission erred in allocating the incremental costs of its coal traffic to all traffic (i.e. non-coal shippers) using the lines in question. BN claims that this decision is directly contrary to the ICC's cost calculations in *Annual Volume Rates, Wyoming to Flint Creek, Arkansas*, 361 I.C.C. 533 (1979) and *Arkansas Power & Light Co.* v. *Burlington Northern, Inc.*, 361 I.C.C. 504 (1979). In each of these cases, the ICC refused to allocate a portion of the incremental costs of coal service to non-coal traffic and shippers. In so deciding, the Commission apparently employed a "but for" test for cost allocation and stated that since the railroads would not have made certain investments "but for" unit-train coal service, it would be unfair to impose a share of the costs on uninvolved shippers.[18]

While the ICC concedes that it has in the past used the "but for" test, it also cites its decision in *Increased Coal Rates on Coal, Colstrip and Kuehn, Montana to Minnesota*, 362 I.C.C. 30 (1979), as establishing a new policy that fixed plant investments will be allocated to all traffic that may benefit from the improvements, even though such investments would not have been made absent a specific type of traffic.

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[18] In *Annual Volume Rates, Wyoming to Flint Creek, supra*, at 541, the ICC states:

> If the railroads included the cost of these investments in their Rail Form A inputs, a share of these extraordinary costs would be allocated to all shippers. While we recognize that these investments will allow faster speeds for other traffic, other shippers do not require, nor have they asked for, this level of service. It would be unfair to present them with a share of the bill.

Similarly, in *Arkansas Power & Light Co.* v. *Burlington Northern, Inc.*, 361 I.C.C. 504, 508 (1979), the ICC observed:

> Finally, we cannot agree with complainants that incremental investment costs should be reduced because some noncoal traffic will take advantage of the fixed plant investment allocated exclusively to coal traffic. We are convinced that the additional investment would not have been made but for unit-train coal service. Therefore, it would be unfair to include these costs in Rail Form A to be spread among all traffic which does not require the upgraded track structure necessary for coal traffic.

The record contains evidence that non-coal traffic will obtain some benefit from the fixed plant investments necessitated by the unit-train movements under review, and in fact the ICC specifically so recognized in its March 10 decision:

> The Commission noted in the *SWEPCO* decision that the "railroads would not have made these investments (fixed plant) 'but for' unit coal train service." Although BN's evidence of record in this proceeding purporting to support the correlation between fixed plant investment and unit coal train service is quite similar to that shown in *SWEPCO,* we do not believe the entire claimed amount of fixed plant investment is necessitated *only* by unit-train coal service. Furthermore, we recognized that these investments, on the one hand, allow better service for noncoal shippers whose freight moves via the subject routes, and, on the other hand, will somewhat reduce the operating expenses of the BN on a per ton basis. Accordingly we agree with complainants that the railroad's incremental fixed plant investments should be allocated to all traffic moving over the subject line segments.

362 I.C.C. at 656 (emphasis added). Thus, the Commission apparently credited the evidence of MPL and the other shippers refuting BN's claim that its fixed plant investments were necessitated solely by the heavier coal traffic. It is true that in the prior cases using the "but for" test, the ICC recognized that non-coal shippers would receive some benefit from the investments. Nevertheless, in both *Flint Creek* and *Arkansas Power* the ICC had found that the coal traffic was the "sole reason" for the added investment. Here, however, the Commission has suggested that non-coal traffic necessitated to some extent the added investment. Under such circumstances, the Commission did not abuse its discretion or act arbitrarily

by requiring the benefitted non-coal traffic to bear part of the cost of the coal-related investments.[19]

Finally, BN claims that the Commission erred in not recognizing the cost of its equity capital in determining an appropriate rate of return on the railroad's locomotive and caboose investments. The ICC calculated the rate of return using 9.34%—the interest rate found in BN's current equipment trust certificates. 362 I.C.C. at 685. BN claims that the equipment trust certificate rate reflects debt financing alone and does not take into account the higher cost of equity capital. BN argues that the 9.34% rate is lower than those approved in other cases and that this violates the 4R Act, which entitled railroads to earn a return on all "capital employed in the business" and to "raise needed equity capital." 49 U.S.C. § 10704(a)(2).

It is true that in *Car Service Compensation—Basic Per Diem Charges,* Ex Parte No. 334 (served August 10, 1977), the ICC explicitly authorized a return on capital which included equity and debt financing instruments. The ICC, however, distinguishes its decision in *Basic Per Diem,* claiming that decision arose in a different factual context and involved a different statutory provision. In the present case, because BN leased much of the equipment used for the freight movements under review, the Commission apparently did not believe that a return on capital including equity was full justified. It stated:

> BN witness Day advocates an annuity equipment costing methodology that treats the equipment as purchased wholly with corporate funds, but he also acknowledges the "rental payment" methodology (—this method is referred to by BN as the interest plus depreciation method) used in prior proceedings. Since the BN is able to use some sort of lease rather than purchase this equipment, we have reservations about accepting a cost

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[19] *Cf. San Antonio, supra,* 631 F.2d at 839-41 (locomotive fuel and maintenance costs properly calculated despite prior ICC decisions employing a different methodology).

> of capital that is not necessarily incurred. Consequently, we shall continue to employ the "rental payment" costing methodology. . . . It is our belief that 9.34 percent represents the interest rate of BN's current equipment trust certificates for this calculation.

362 I.C.C. at 685.

In *Annual Volume Rates on Coal—Wyoming to Flint Creek, Arkansas*, 361 I.C.C. 533, 547 (1979), and *San Antonio, Texas* v. *Burlington Northern, Inc.*, 362 I.C.C. 161, 165 (1979), the ICC indicated that it would use a rate of return for equipment based upon equipment trust certificates. Thus, there is ICC precedent for the method and supporting rationale employed here to calculate the rate of return on this equipment. Given BN's witness testimony acknowledging this technique, as well as the evidence that many of the BN locomotives were acquired by lease instead of direct purchase, we cannot accept BN's claim that the ICC erred or abused its discretion in fixing the return at the equipment trust certificate level in order to approximate the "rental" cost of this equipment. *Accord, Iowa Public Service Co.* v. *Interstate Commerce Commission*, 643 F.2d 542, 547-48 (8th Cir. 1981).

With respect to CC's cost-accounting arguments, we observe in the first instance that in vacating so much of the order as applies to the CC rates for Colstrip and Kuehn and remanding to the Commission, we conceive that the Commission will accord to both BN and CC the right to introduce such additional proofs as may be appropriate in the circumstances, particularly in the light of our findings here.

CC contends that the ICC erred by allowing any return on capital for 80% of the locomotives in the Forsyth coal power pool used for the unit-train coal movements since these locomotive units were leased. CC argues that BN has incurred no cost of capital but merely an operating expense.

According to the Interstate Commerce Act, the ICC is permitted to allow a return on "capital" employed in the business. 49 U.S.C. § 10704(a)(2). As indicated earlier, it appears that the ICC allowed a rate of return on leased locomotives in order to cover what the Commission viewed as the rental cost of the locomotives, a cost determined by reference to the rate of interest found in the equipment trust certificates which BN used to finance its acquisition of these locomotives. The Commission expressly stated:

> [T]his equipment is usually financed by equipment trust certificates, sale-and-lease back agreements, lease-purchase agreements, and the like. . . . Since this equipment is not dedicated to the service of a particular shipper [i.e. this equipment is "pooled" for all shippers to use as needed] and because of the different types of financing available, it is our belief that this method [i.e. depreciation and debt rates] approximates a reasonable compensation level . . . .

362 I.C.C. at 685. Based upon our prior discussion and the foregoing language, it appears to us that the ICC has answered both CC's and BN's complaints through this technique of allowing calculated "rental payment" rate of return.[20]

CC also argues that the Commission, in determining the cost of service for the BN-CC line movements, should have applied cost evidence submitted by MPL for the BN-MPL rate determination, since certain portions of the MPL and the CC line movements are virtually identical. It appears that the ICC used MPL's evidence for railroad maintenance cost along the BN-MPL line, but then used BN's higher system-wide average maintenance expense levels for the DE and

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[20] We are frank to acknowledge that the ICC's approach described above is not entirely clear and that we have some difficulty in understanding the Commission's explanation. In particular, we find no clear discussion of its decision to include both leased and purchased locomotives in the capital cost calculation. This deficiency should be capable of correction upon remand. The Commission should explain whether there are, or should be, different rates of return for those locomotive units which BN actually purchased vis-a-vis those units which BN leased. Moreover, it is not clear whether the length of the lease agreements should make a difference in categorizing the leased equipment as a cost of capital rather than as an operating expense.

CC lines, even though this traffic moved over line segments quite similar to the MPL line. Likewise, the ICC used MPL's apportionment factors when determining the amount of incremental road investment to be allocated to the BN-MPL variable cost determination. Yet, the ICC refused to apply these apportionment factors to determine variable costs for the BN-DE and BN-CC line movements. For both of these cost determinations, CC claims that the ICC was required by 49 U.S.C. § 10701(b)(2)(B)[21] to apply MPL's specific cost evidence to other shippers' rate determinations if they travel over the same line segments as MPL.

The Commission justifies its refusal to apply MPL's railroad maintenance cost evidence to CC on the basis that the evidence has not been broken down into line segment form and therefore the Commission could not ascertain what portions of the MPL evidence were pertinent to the CC movements. Similarly, with regard to apportionment of fixed plant investments to the various line movements, the ICC claims that the apportionment factors submitted by MPL could not be applied to the BN-CC and BN-DE line movements since the MPL evidence was not broken down into line segments. Thus, the Commission accepted BN's higher apportionment factors in calculating the cost of service for CC and DE, it being the best evidence available.

From our review of the record, it appears that MPL's roadway maintenance cost analysis was performed on a line segment basis and that several of these line segments were coinci-

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[21] Section 10701(b)(2)(B) states:

> Variable and incremental costs shall be determined under formulas prescribed by the Commission. However, when making a determination of variable costs, the Commission shall, on application of the rail carrier proposing the rate, determine only the costs of that carrier and only those costs of the specific service in question unless the specific information is not available. The Commission may not include in variable costs an expense that does not vary directly with the level of transportation provided under the proposed rate.

49 U.S.C. § 10701(b)(2) (1979 Supp. III).

dent to certain portions of the CC movements. *See* 362 I.C.C. at 666-67, 644-46. There is also an indication that MPL developed line segment cost evidence for the allocation of incremental fixed plant investments. *See* 362 I.C.C. at 656-57. We recognize that with regard to the incremental fixed plant allocation factor, the ICC's March 10 decision stressed that MPL's calculations were based on "all" traffic applicable to the unit-train coal movement and that CC had failed to submit the necessary information which would have allowed the ICC to develop allocation factors for "all" other traffic on the BN-CC line.

Inasmuch as we have found it necessary to remand the CC's Colstrip and Kuehn rate determinations back to the ICC, we urge the Commission to explain the apparent discrepancy between, on one hand, its justification on appeal for refusing to use MPL's railroad maintenance cost evidence and apportionment factors in the CC rate determination and, on the other, its express recognition in the March 10 decision that MPL's evidence was broken down into line segments. Moreover, it is not clear why MPL's apportionment factors, based on all traffic using the various segments comprising the BN-MPL unit-train movement, could not be applied to the BN-CC unit-train movement, at least for those line segments common to both movements. It may be that the ICC's costing techniques were such that apportionment factors for common MPL-CC line segments could not be used in conjunction with BN's evidence developed for separate CC line segments. On this issue, the ICC should more fully explain its reasoning.

CC also argues that the ICC acted inconsistently and arbitrarily in determining the locomotive maintenance cost. It claims the Commission accepted specific evidence offered by CC and DE demonstrating that the average repair cost for locomotives used in the unit-train service was 47.6% lower than the system average because of more efficient utilization of these locomotives. CC contends that this percentage decrease adjustment was in direct response to BN's claim that the heavier weight and greater complexity of the coal locomotives resulted in a 25% increase in locomotive maintenance cost relative to the system average. However, after the ICC accepted CC's 47.6% adjustment, it nonetheless accepted BN's 25% increase based on the size of the locomotive. This, it is argued, is patently inconsistent and erroneous.

In its brief, the ICC explains this apparent inconsistency in terms of a two-step cost accounting process for determining locomotive maintenance expenses. First, the Commission apparently accepted BN's 25% upward adjustment since the heavier weight and greater complexity of each coal locomotive results in higher average fuel and maintenance costs *per locomotive unit*. The ICC then apparently accepted CC's 47.6% downward adjustment when computing the locomotive unit *per mile* maintenance cost because the higher than average utilization of unit-train locomotives and economies associated therewith results in a decrease in cost on a per-mile basis.[22]

We have carefully reviewed the Commission's rationale on this issue and again find an inconsistency with the ICC arguments on appeal.

According to the ICC's decision, the BN upward percentage weight adjustment was premised upon the railroad's belief that "repair cost *per locomotive unit mile* [was greater]. This is contrary to DE's claim that the higher utilization of coal locomotives would result in lower unit repair cost per unit-mile." 362 I.C.C. at 664 (emphasis added).

We recognize that the Commission has allowed upward adjustment in unit-train locomotive fuel and maintenance costs in the past. *See Incentive Rate on Coal-Hayden, Colorado to Kings Mill, Texas*, 359 I.C.C. 749 (1979) and *Annual Volume Rates on Coal-Wyoming to Flint Creek, Arkansas*,

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[22] Locomotive unit costs and maintenance calculations were discussed in several separate sections of the ICC opinion. *See* 362 I.C.C. at 663-65 (origin and destination switching costs); 362 I.C.C. at 669-70 (gross ton-mile costs); 362 I.C.C. at 670 (locomotive unit-mile costs).

361 I.C.C. 533 (1979). In other cases, the ICC has opted not to allow the weight adjustment. *See San Antonio, Texas* v. *Burlington Northern, Inc.*, 359 I.C.C. 1 (1978). But in this case the two adjustments seem to be juxtaposed by the ICC's own analysis and therefore somewhat incompatible. Moreover, it appears from the ICC's own rationale that the BN weight adjustment was based on a per unit-mile theory, not just a per unit basis as argued in the ICC brief.

We note, however, that BN argued before the ICC that this upward percentage weight adjustment was justified because of the relatively young age of the unit-train locomotives when compared to the average age of locomotives in the system. BN argued that as these unit-train locomotives get older, they become increasingly more expensive to maintain; therefore, the 25% upward adjustment was necessary to correct maintenance costs that would otherwise be understated due to the timing of the ICC rate determination. 362 I.C.C. at 664-65. If the available average repair cost figures were based upon relatively new locomotives that with time incur increased maintenance expenses, the upward adjustment may have been necessary despite the shippers' percentage decrease due to increased efficiency and lower repair costs per unit mile. In this context, both adjustments could be applied consistently. Thus, we cannot say that the ICC abused its discretion and misapplied its expertise in reaching what may well have been a logical compromise between two otherwise flawed cost figures. Upon remand, the ICC should clarify its rationale for making these two adjustments in the CC rate case.

CC also claims that the ICC erred in determining the appropriate rate of return on the railroad's equity capital by applying the statutory rate of 46% instead of the computed effective tax rate of 25.96%. CC contends its expert demonstrated that the lower tax rate was the more accurate rate to apply in order to adjust the actual cost of equity upward to account for taxes paid to the government. CC argues that by arbitrarily using the higher statutory tax rate, the Commission gave BN a windfall since the freight rate would reflect a tax liability that would not be incurred. In our opinion, the short answer to this is found in *San Antonio, supra.* There the court held that the ICC can confer the tax benefit to the railroads by applying the statutory tax rate, since deferred taxes will eventually have to be paid and because use of the statutory tax rate will induce further capital investment. *See San Antonio, supra,* 631 F.2d at 846-47. *San Antonio* did not discuss the question whether forgiven taxes should be accorded the same treatment as deferred taxes under this rationale. While CC does not appear to dispute that forgiven taxes can be accorded the same treatment as deferred taxes, it does urge that if the ICC was correct in applying the higher statutory tax rate, the Commission had to subtract the deferred tax account from the net investment here. There is no suggestion in the record here that the ICC did or did not deduct any deferred tax or forgiven tax accounts from the investment base. On remand, the ICC should clarify whether this adjustment was indeed appropriate and in fact performed. In addressing this same question, the D. C. Circuit stated:

> As this court has recognized . . . the principle of excluding a deferred tax reserve from the rate base, as such reserve comes into existence, is an essential component of an agency's election to [use the statutory tax rate]. . . . The Commission's own procedures set forth in Ex Parte No. 338 also underscore the necessity of subtracting the deferred tax reserve from the net investment base . . . .

San Antonio, supra, 631 F.2d at 847.

Finally, CC attacks the ICC's purported use of the "seven percent solution" which is an additional return granted by the ICC to assure adequate revenue for the railroad. This increment is associated with the practice of "differential pricing" whereby the rates for profitable rail service are set so as to subsidize other less profitable but needed rail service.

In the present case the ICC did not actually apply the seven percent additive in making its calculation. Rather, the Commission expressed the opinion that were it to set the maximum reasonable rate under its pre-contract rates policy standards, it may have added the seven percent additive above fully allocated costs. 362 I.C.C. at 641.

In *San Antonio*, the D.C. Circuit chastened the Commission for failing to provide any justification for adding the seven percent increment above fully allocated costs. *San Antonio, supra*, 631 F.2d at 852. The D.C. Circuit relied upon a prior ICC decision that listed four criteria to be used to determine the need for the percentage increment;[23] the court then directed the Commission "to explain more fully its reasons for selecting a particular increment, if any, above fully allocated costs . . . ." *Id.*, at 853. We agree that if the Commission should determine to provide an increment above fully allocated costs, it must offer some evidence and a rationale sufficient to support its decision. In making such a decision, the ICC should balance the interests of carriers, shippers, and the public, taking into account the need for railroads to earn adequate revenues yet recognizing its duty to protect captive shippers from monopoly profiteering. However, we do not agree with CC that the railroad must necessarily submit specific evidence on each of the four criteria listed in *San Antonio*. There may be reasons, wholly apart from these four criteria, that would justify the increment. It is the ICC's duty to follow the rate-making standards found in the Interstate Commerce Act and to provide an adequate justification for its decision.

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[23] The court stated:

> [T]he Commission asserted that before it would impose a "substantial burden on some shippers," the railroads would be required to submit data on the following:
>
> (1) specific identification of the traffic that must be subsidized by other traffic and the reason why rates cannot be increased on that traffic;
>
> (2) the extent to which the railroads provide service on unprofitable branch lines and the reason(s) why such service cannot be made profitable or abandoned;
>
> (3) identification of commodities other than coal which could also make substantial contributions to the railroads' system revenue needs; and
>
> (4) identification and quantification of excess capacity on a carrier's system.

San Antonio, supra, 631 F.2d at 850-51 (quoting from *San Antonio, Texas* v. *Burlington Northern, Inc.*, 361 I.C.C. 482, 496 (1979)).

VI.

The foregoing rulings have all been made in accordance with what the court has conceived to be the appropriate law as it was in effect at the time the petitions were filed, namely the Interstate Commerce Act as amended by the 4R Act. However, the Staggers Rail Act of 1980, Pub.L. No. 96-488, 94 Stat. 1895 (1980), 49 U.S.C.A. § 10101 *et seq.* (1981 pamphlet), became effective between the date of filing of the petitions and the date of the hearing in our court. We therefore requested additional briefing on the issue of what effect, if any, this new statute may have on the disposition of this appeal. We conclude that we are bound to decide this case in accordance with the law as it existed before the Staggers Rail Act. We believe that such a ruling is in accord with the Staggers Rail Act and existing judicial precedent, and that a proper beginning for the operation of the new policy as applied to this case depends upon a proper disposition under the old statutory scheme. As we have held in *The Hanna Mining Co.* v. *The Escanaba and Lake Superior Railroad Co.*, No. 80-1681, also decided today, we limit our discussion of the new Act to the extent only that it is required by the facts before us.

The Staggers Rail Act of 1980 was signed into law by the President on October 14, 1980, and made effective as of October 1, 1980. The Act makes significant changes in the Interstate Commerce Act, particularly with regard to ICC jurisdiction to review proposed rates and to establish maximum reasonable rates. In essence, the Rail Act sought to deregulate the rail industry by allowing "to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." Pub.L. No. 96-448, § 101, 49 U.S.C.A. § 10101a.

Two provisions of the Staggers Rail Act are particularly relevant to determining the ICC's and this court's continued jurisdiction over the rate cases under review today. Section 202 establishes minimum threshold revenue-to-variable cost percentages, as a requirement for ICC jurisdiction to find market dominance which, in turn, is the necessary prerequisite for the ICC's authority to investigate the reasonableness of a proposed rate. *See* 49 U.S.C. § 10709 (1979 Supp. III). For the relevant time frame of this appeal, (i.e., October 1, 1980 to September 30, 1981), the applicable percentage threshold is 160%. Under the Staggers Rail Act, any proposed rate that generated a revenue-to-variable cost percentage of less than 160% could not be reviewed by the ICC for reasonableness. Pub.L. No. 96-448, § 202, 49 U.S.C.A. § 10709(d)(2)(A).

Section 208 authorizes rail carriers and shippers to enter into private agreements establishing rates for rail transportation services. Any such contract must be filed with the ICC and becomes valid unless the Commission finds that the contract violates that section.[24] The ICC apparently cannot set the maximum reasonable rate between two contracting parties. Thus, subsection 208(i)(1) exempts contracts filed with the ICC from the other provisions of the Interstate Commerce Act and from any subsequent review by the ICC. Subsection 208(i)(2) vests exclusive jurisdiction in the courts for enforcement of contracts that are filed with the ICC.

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[24] Under section 208, contracts setting rates for transportation of non-agricultural products may be reviewed by the ICC only to determine if (1) the contract unduly impairs the common carrier obligations of the contracting railroad to a non-contracting shipper or (2) the contract results in an unreasonable discrimination against a port. Contracts establishing rates for the transportation of agricultural commodities can be reviewed upon the grounds listed above and also to determine if the contract either discriminates against another shipper or constitutes a destructive competitive practice. *See* Pub. L. No. 96-448, § 208(d), 49 U.S.C.A. § 10713(d).

> The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate state court or United States District Court, unless the parties otherwise agree.

Pub.L. No. 96-448, § 208(i)(2), 49 U.S.C.A. § 10713(i)(2).[25] Finally, subsection 208(j), commonly known as a "grandfather clause," deals with contracts that do not technically fall under section 208's filing requirement because they were entered into prior to the effective date of the Staggers Rail Act. The section provides that such contracts have the same effect as do those entered into in accordance with the section. Pub.L. No. 96-448, § 208(j), 49 U.S.C.A. § 10713(j); *See infra* at 42. As noted in the companion case also decided today, *see The Hanna Mining Co.* v. *The Escanaba & Lake Superior Railroad Co.,* No. 80-1681, Congressman Dingell introduced this grandfather provision as an amendment and expressed his intention that pre-existing lawful contracts were to be enforced in courts of law. *See* 126 Cong. Rec. H8606 (daily ed. September 9, 1980); 126 Cong.Rec. H10085-86 (daily ed. September 30, 1980).

BN argues that the Staggers Rail Act should apply and that its proposed rate increases do not reach the minimum revenue-to-variable cost threshold for ICC jurisdiction under section 202. Moreover, BN asserts that under section 208, the shippers must seek enforcement of their rate agreements in the courts. Therefore, BN argues that the ICC reasonableness determinations should be vacated.

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[25] The Conference Report to the Staggers Rail Act discusses the purpose behind section 208 in no uncertain terms:

> The provision [section 208] establishes a separate class of rail service and thereby makes carriers entering into such contracts both common carriers and contract carriers. Once a contract is approved by the Commission or goes into effect because the Commission has not acted within the sepcified time limits, the service provided under the contract is exempt, . . . from *all* regulation and all of the requirements of the Interstate Commerce Act. . . . Once contracts are approved under this section, they are to be enforced in the courts and not at the Commission.

H. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 100, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4110, 4132 (emphasis added).

The application of the Staggers Rail Act to this case is no easy task, for it involves a rate dispute whose genesis and conclusion span a long time frame. The agreements involved in this case were negotiated long before the Staggers Rail Act. The ICC rendered its final decision concerning BN's proposed rate increases (and an appeal was docketed) during the twelve-month period preceding passage of the new statute. Oral argument was heard after the effective date of the new statute.

We are firmly of the opinion that a proper construction of the Staggers Rail Act requires us to hold that neither the ICC nor this court is relieved of its respective obligations under the former statute to determine the reasonableness of the challenged rates and the validity of that administrative determination through the typical channels of judicial review. Moreover, we believe the law to be applied is that which was in existence before the enactment of the Staggers Rail Act and upon which the Commission made its decisions in these cases.

In reaching this decision, we first note that the House version of the Staggers Rail Act, H.R. No. 7235, 96th Cong. 2d Sess. (1980), contained a provision stating that all proceedings and cases pending before the ICC, other agencies, or the courts should be decided under pre-Staggers Rail Act law. The Conference Committee deleted this provision and replaced it with section 706 of the Staggers Rail Act. Section 706 addresses the effect of the new statute on pending rate bureau proceedings, a type of administrative proceeding wholly distinct and apart from the rate reasonableness determinations being reviewed today. However, the portion of the Conference Report accompanying section 706 strongly indicates that Congress intended the courts to decide whether to apply the Staggers Rail Act to cases, other than rate bureau proceedings (i.e., rate reasonableness determinations such as these), that were pending as of October 1, 1980. Specifically, the Conference Report states:

> Section 706 — Effect on Pending Matters
>
> *Senate bill.* — No provision.
>
> *House Amendment.* — The House bill contains a provisions which states that all applications or proceedings pending before the Commission or other agencies, or any court, shall be determined as if this law had not been enacted.
>
> *Conference substitute.* — The conference substitute deletes the House provision, but clarifies that existing rate bureau proceedings shall be conducted under the law prior to the enactment of this Act. The House bill, as passed, contains a section determining the effect of this legislation on pending matters. The fact that the Conference substitute does not contain a similar provision is not intended to create any implication that other cases now pending at the Commission, other affected agencies, or pending in the federal courts are not to be adjudicated or determined under existing law or the new legislation in accordance with controlling case law. The deletion of these provisions means that existing cases at the Commission, other affected agencies, or pending in the Federal courts, shall be determined as present case law requires that they be determined.

H.Conf. Rep. No. 1430, 96th Cong., 2d Sess. 142, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4110, 4174. As we observed in the companion case of *The Hanna Mining Co.* v. *The Escanaba & Lake Superior Railroad Co.*, No. 80-1681, we are in general agreement with the Eighth Circuit's rationale in *Iowa Power & Light Company, supra,* and find that under existing precedent, the Interstate Commerce Commission and this court retained jurisdiction to decide and review these pending rate reasonableness cases, and that the final decision as to the legality of these rates should be based on pre-Staggers Rail Act law.[26]

We recognize that with respect to contract rates, Congress has accorded section 208 treatment to those pre-existing contracts which were "lawful" and "in effect" on October 1, 1980.

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[26] In reaching this decision, we note that with section 229 of the Staggers Rail Act, Congress provided a mechanism for challenging any rate in effect at the time the Act came into force.

> SAVINGS PROVISIONS
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> SEC. 229. (a) Any rate that is in effect on the effective date of this Act for transportation by a rail-carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of title 49, United States Code, may, during the 180-day period beginning on such effective date, be challenged in a complaint filed with the Interstate Commerce Commission by any interested party alleging that the rail carrier has market dominance over the transportation to which the rate applies, as determined under section 10709 of such title, and that the rate is not reasonable under section 10701a of such title.
>
> (b) Any rate described in subsection (a) of this section—
>
> (1) which is not challenged in a complaint filed within the 180-day period provided in such subsection; or
>
> (2) which is challenged in such a complaint, but (A) the rail carrier is found not to have market dominance over the transportation to which the rate applies, or (B) the rate is found to be reasonable,
>
> shall be deemed to be lawful and may not thereafter be challenged in the Commission or in any court (other than on appeal from a decision of the Commission).
>
> (c) The provisions of this section shall not apply to any rate under which the volume of traffic moved during the 12-month period immediately preceding the effective date of this Act did not exceed 500 net tons and has increased tenfold within the 3-year period immediately preceding the bringing of a challenge to the reasonableness of such rate.
>
> (d) The burden of proof in any proceeding under this section shall be on the complainant.

There is no indication that the Commission, in deciding cases brought pursuant to section 229, was to make a rate reasonableness determination under the new statutory scheme. In fact, the Conference Report stated: "The purpose of this provision is to give affected parties a final opportunity to review the reasonableness of existing rates before their opportunity to challenge those rates is curtailed." H. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 121, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4110, 4153. In light of this congressionally afforded op-

> The provisions of this section shall not effect the status of any lawful contract between a rail carrier and one or more purchasers of rail service that is in effect on the effective date of the Staggers Rail Act of 1980. *Any such contract shall hereafter have the same force and effect as if it had been entered into in accordance with the provisions of this section.*

Pub.L. No. 96-488, § 208(j), 49 U.S.C.A. § 10713(j) (emphasis added). Congressman Dingell's comments on the floor of the House further amplified the intent behind subsection 208(j):

> The provision I support was designed to preserve rights related to pre-existing rate agreements whether or not such agreements were previously enforceable. It gives to such contracts the same standing and enforceability as if they were negotiated and signed after the contract provisions of the bill were enacted into law. But it also preserves the legitimate rights of the railroads by guaranteeing that they will be able to challenge the existence of a previously entered lawful contract.

126 Cong. Rec. H8606 (daily ed. September 9, 1980).

The plain language of Congressman Dingell's amendment, as well as the legislative history reflected by his comments in the House of Representatives, dispels any doubt that Congress intended to "grandfather-in" those pre-existing rate agree-

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portunity for review of rates *after* October 1, 1980, we believe that this petition for review, as well as the appeal in the companion case, *see The Hanna Mining Co.* v. *The Escanaba and Lake Superior Railroad Co.*, No. 80-1681 (both cases having been decided initially before Congress enacted the Staggers Rail Act) should be reviewed according to the law as it existed prior to October 1, 1980. Otherwise, we would have the rather anomalous result that parties challenging rates within 180 days after the new law was in effect would have an opportunity for review under the prior law while parties who had cases pending or completed at the Commission would be subject to the new statutory scheme. If the new law were applied in CC's case, as suggested by BN, the shipper would be precluded from taking advantage of a congressionally conferred opportunity (possibly without further recourse) because of the timing of this court's decision.

ments subject only to two requirements: that the contract be lawful and in effect as of October 1, 1980. As noted earlier, the "exclusive remedy for any alleged breach of a contract entered into under this section shall be in an action in appropriate state court or United States District Court, unless the parties otherwise agree." 49 U.S.C.A. § 10713(i)(2).

We make these observations knowing that they are at odds with certain conclusions of the Commission which we believe represent an unwarranted extension of its power over rate agreements after the effective date of the Staggers Rail Act. Thus, in a policy statement issued by the ICC and furnished to us in connection with its supplemental brief,[27] the Commission has recognized Congress' intent, in enacting the Staggers Rail Act, to limit the power of the Commission to review freight rates established by contracts between shipper and carrier. Nonetheless, the Commission asserts that it retains jurisdiction to regulate rates arising from such agreements in existence at the effective date of the Act whether or not they were the subject of a pending proceeding before the ICC or federal appeals court.

The Commission's position seems to be founded on the observation that pre-existing agreements must be "lawful" and "in effect" on October 1, 1980, in order to be insulated from ICC review pursuant to section 208. It seems the Commission now claims that the determination of "lawfulness" is, in part, tied to the determination of "reasonableness" under the Interstate Commerce Act and, therefore, that the ICC has retained jurisdiction to review all pre-existing contract rates before they can be enforced in federal or state courts.

The difficulty with this position in our view is that it flies in the face of the express language of the statute and a clear congressional intent, discussed above, to allow parties to establish freight rates without further review by the ICC for the reasonableness of their contract rate. Section 208 allows only limited ICC review of contract rates, on grounds other than the traditional reasonableness criteria. Moreover, section 208 review proceeds on a more expedited time schedule than allowed for reasonableness determinations.[28] Our decision to uphold the ICC's jurisdiction over the rates at issue here is based on the fact that this rate dispute was pending on appeal at the time the Staggers Rail Act was enacted into law. However, contracts and rates therein that were in effect but were not under challenge before the ICC or the courts at the time the new statute came into force, and that are not before the ICC pursuant to section 229 of the Staggers Rail Act,[29] fall within section 208 of the new statute and are not subject to ICC reasonableness review.

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[27] *See* ICC, "Interpretive Statement — Contract Rates" (decided November 5, 1980).

While such comment may appear to be dicta in this context, we deem it necessary in view of our remand of the proceedings concerning the BN-CC rate dispute. The Commission also appears to imply that it has authority under subsection 208(j) to entertain and decide questions concerning the existence and validity of contracts in terms of the common law of contracts. This is the first indication to this court that the Commission intended to undertake such a purely judicial task, and we are unable to find support in the Staggers Rail Act or prior law for it. Certainly, the Commission never before has claimed any expertise as to the existence and interpretation of contracts and has never claimed that it can enforce a contract between a shipper and carrier. Rather, the Commission has contented itself to consider proof regarding the existence and content of such agreements as merely evidence bearing on the reasonableness of rates being charged by a carrier. *See ante* at 9.

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[28] Section 207 of the Staggers Rail Act allows the Commission a maximum of eight months for investigating and determining the reasonableness of rates filed with the ICC by a railroad acting as a common carrier. Section 208 only allows the Commission 30 days to complete an investigation of contract rates filed with the ICC. *See* Pub. L. No. 96-488, §§ 207, 208, 49 U.S.C.A. §§ 10707(b), 10713(d)(3)(A).

[29] *See* n.26 *supra.*

We thus conclude that on its face, section 208 evinces an unequivocal intention that matters of contract dispute between shipper and carrier are to be decided by courts of law rather than by the ICC, and that rates established by contract are to be enforced, if anywhere, in the courts without review under the Interstate Commerce Act by the ICC.

Where contract rates are, after final review, determined to have been in effect on the effective date of the Act, the question thereafter of their legality and of their continuing impact is a matter to be governed by contract law as applied by the appropriate state or federal district court and not by the Commission. The Conference Report accompanying the Staggers Rail Act states: "If a case is in Federal Court or has been remanded to the Commission, the Conferees intend that the rate ultimately determined by the Commission shall be considered the rate in effect on the date of enactment for the purposes of this Act." H.Conf. Rep. No. 1430, 96th Cong., 2d Sess. 142, *reprinted in* [1980] U.S. Code Cong. & Ad. News, 4110, 4174.

Assuming that our decision in the Minnesota Power & Light and Detroit Edison rate cases is final, these rates would be the rates in effect on the effective date of the Act. Likewise, with respect to the rates finally established in the petition of Cleveland Cliffs, those must of course await ultimate determination by the Commission upon remand and any further action by this court on any subsequent petition for review. Only after final action on this petition will the rate in effect on the effective date of the Staggers Rail Act be known.

At the same time, we hasten to make clear that the determinations of the Commission with respect to the reasonableness of these rates and, indeed, of our decision with respect to the validity of the ICC determinations, are not intended to indicate any final judgment as to the lawfulness or validity of the underlying agreements themselves. This case was not argued on the basis of contract law, nor could it have been since no action has been taken in a court of original jurisdiction. We have not decided any matters of a contractual nature. We have not endeavored to determine whether these agreements were, in fact, binding legal contracts, or whether perhaps under principles of equity, relief from these agreements might or might not be appropriate. These matters are to be decided, in the first instance if at all, in the several courts of the state or nation.

Attachment A

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 358-F

CHANGE OF POLICY, RAILROAD CONTRACT RATES

Decided February 21, 1980

Late Release Service Date Feb. 21, 1980

This statement is issued as a clarification and amplification of our prior statements served November 9, 1978 and April 10, 1979 in Ex Parte No. 358-F. In those prior statements, we expressed our view that rates established in contracts between rail carriers and shippers are not unlawful *per se* under the Interstate Commerce Act and that in certain circumstances such rates should be encouraged.

In several subsequent cases in which carriers proposed rate changes, however, we declined to consider claims by shippers that the change was in excess of previously executed contracts with the shippers.[1] Instead, we determined the reasonableness of the changes under ordinary standards and stated that disputes concerning the existence and legal significance of alleged contracts should be resolved by the courts. We also expressed the view that the alleged contracts in those cases were not legally binding because they were entered into before we issued our policy statement in Ex Parte No. 358-F. We have determined that reconsideration of our treatment of alleged contracts in those cases, which are currently pending before the Commission on petitions for administrative review, is warranted.

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[1] Docket No. 36970, *Annual Volume Rates on Coal-Wyoming to Flint Creek, Arkansas* and consolidated cases (decisions served May 3, 1979 and May 25, 1979); and Docket No. I & S 9199, *Unit Train Rates on Coal-Burlington Northern, Inc.*, and consolidated cases (decision served July 13, 1979).

In order to implement our views in Ex Parte No. 358-F, we have concluded that it is appropriate, in cases in which rate changes are proposed, for the Commission to consider claims by shippers that the rate change is in excess of a contract between the carrier and the shipper. We believe that it may also be appropriate in some cases in which we find the shippers' claims to have merit, to suspend the rate change and/or ultimately to find that the filing of the change is unreasonable and unlawful and to prescribe a rate that conforms to the contract.

Our conclusions are based on both legal and policy considerations. As a legal matter, in cases in which a carrier files a rate change that is approved by the Commission but that is in violation of the carrier's contract with a shipper, we believe that courts are without legal authority to provide shippers with a meaningful remedy for the breach of contract. Thus, it is well settled that courts may not award damages to shippers that would have the effect of reducing their transportation charges below the rate on file with the Commission. See, *e.g. Montana-Dakota Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951); *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 453 (1945); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *Farley Terminal Co., Inc.* v. *Atchison, T. & S. F. Ry. Co.*, 522 F.2d 1095, 1098 (9th Cir. 1975). It is also well established that a court has no power to suspend or enjoin the effectiveness of a rate on file with the Commission. See, *e.g.*, *Seaboard Allied Milling Corp.* v. *Southern Ry. Co.*, 99 S. Ct. 2388 (1979); *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963). The principle of those cases would also preclude courts from ordering a carrier to file a superceding tariff with the Commission in accordance with its contract because such an order would have the same effect as suspending a rate on file with the Commission. In light of these authorities, the Commission has concluded that if it declines to give any consideration to contracts between shippers and carriers when assessing the reasonableness of a rate increase, shippers would be without an effective remedy and the result would significantly undermine the Commission's policy in Ex Parte No. 358-F.

The foregoing legal considerations are reinforced by considerations of sound regulatory and transportation policy. Consideration of the weight to be given to contracts by the Commission rather than by many different federal and state courts will ensure national uniformity in the standards to be applied to rate matters, which is a fundamental purpose of the Interstate Commerce Act. See *United States* v. *Radio Corporation of America,* 358 U.S. 334, 346-348 (1959); *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 440 (1907). Such consideration by the Commission facilitates implementation of federal transportation and regulatory policies in a consistent manner.

Accordingly, the Commission will now consider rate contract allegations when raised in Commission proceedings. In regard to contracts entered into *after* issuance of the Commission's November 9, 1978 policy statement in Ex Parte No. 358-F, we will view the existence of such a contract as creating a presumption that a proposed rate change in excess of the contract rate is unreasonable in violation of the Interstate Commerce Act. However, there may be unusual and compelling circumstances which would rebut this presumption and warrant our upholding a rate change in excess of a contract rate. For example, the Commission might determine that a contract rate should not be enforced if it failed to contribute to the going concern value of the carrier as required by 49 U.S.C. 10701(b) or is likely to imperil the carrier's ability to provide essential rail service to the public. *Cf. FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).

The Commission intends shortly to institute a rulemaking that will propose several specific substantive and procedural requirements for contract rates and will propose to define more precisely the types of circumstances that might warrant Commission approval of a rate change that departs from the one agreed to in a valid contract. In the meantime, pending more specific rules, carriers and shippers should assume that the Commission will give recognition to contractual agreements concerning rates, in the absence of compelling circumstances indicating that enforcement of the agreed rate would be detrimental to the public interest.

The Commission has further concluded that the fact that particular agreements were negotiated prior to the issuance of its 1978 Ex Parte No. 358-F policy statement, is not an appropriate reason for giving them no consideration. It is true that the lawfulness of such contracts was somewhat uncertain when the parties entered into them, although in our 1978 policy statement we concluded that they had never been unlawful *per se*. In any event, as we noted in the subsequently decided cases (see note 1, *supra*), permitting a carrier to file rate increases in excess of its contract with a shipper may often result in substantial hardship and unfairness to the shipper, particularly if the shipper made substantial capital expenditures in reasonable reliance on the agreed upon rates. Accordingly, the Commission will consider whether, or to what extent, to enforce such pre-Ex Parte 358-F contracts on a case-by-case basis in determining whether a proposed rate increase is unreasonable under the Act. Such alleged contracts will be considered and will be given great weight if the shipper demonstrates (1) that the parties intended to be legally bound by the agreement, (2) that the shipper reasonably relied on the contract to its substantial detriment (*e.g.* by making large capital investments that it would not otherwise have made); and (3) that public interest considerations warrant holding the carrier to the agreement. In sum, with respect to agreements entered into before our 1978 policy statement, the Commission will weigh the alleged agreement, together with all other factors bearing on the reasonableness of the proposed rate. Consideration of these factors may lead us to prescribe or approve a rate within a range from the contract rate to the maximum reasonable rate that would apply in the absence of a contract.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, and Alexis.

Commissioner Alexis was absent and did not participate.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

Opposition

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Office - Supreme Court, U.S.
FILED
DEC 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-755

In the Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
Acting General Counsel

KATHLEEN M. DOLLAR
Associate General Counsel

CECELIA E. HIGGINS
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

QUESTIONS PRESENTED

1. Whether the Staggers Rail Act of 1980 required the court of appeals to vacate the Interstate Commerce Commission's rate determination in this case when that determination was made before the Act became effective.

2. Whether the Commission was authorized to consider a negotiated rate agreement as evidence bearing on the reasonableness of a rail carrier rate.

3. Whether, in the circumstances of this case, the court of appeals had authority to disburse to the shipper an escrow fund into which the shipper had paid an amount equal to the difference between the rate established in an initial Commission determination and the maximum reasonable rate prescribed in a subsequent Commission determination.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 647 F.2d 796. A subsequent order of the court of appeals, entered May 8, 1981, releasing an escrow fund to Iowa Power & Light Company (Pet. App. B) is unreported. The opinions of the Interstate Commerce Commission are reported at 364 I.C.C. 186 (Pet. App. C1-C26) and 361 I.C.C. 655 (Pet. App. D1-D41).

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1981. A petition for rehearing was denied on July 20, 1981 (Pet. App. G). The petition for a writ of certiorari was filed on October 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns shipments of coal transported by petitioner Burlington Northern Inc. (BN) to an electric generating plant of the Iowa Power and Light Company (IP&L). BN and IP&L negotiated a rate to cover the shipments, and the Interstate Commerce Commission (Commission) considered that agreement when it determined the maximum reasonable rate for the shipments.

1. The Commission's consideration of the parties' privately negotiated agreement was in accordance with a policy adopted by the Commission in recent years concerning such agreements. In November 1978, the Commission issued a policy statement declaring that rail transportation rate agreements were not, and had never been, unlawful *per se* and that prior Commission statements suggesting their unlawfulness had been *dicta*. Ex Parte No. 358-F, 43 Fed. Reg. 58189 (1978). The Commission concluded that in some circumstances, such as large scale coal transportation, contract rates were appropriate and should be encouraged, because they could provide lower costs and lead to improved rail capital financing in view of the greater measure of certainty provided potential investors. *Id.* at 58190. In several cases decided after 1978, however, the Commission allowed tariff increases to go into effect notwithstanding claims of

shippers that the increases were contrary to their rate agreements with rail carriers. The Commission declined to give any weight to those agreements because they were entered into before the Commission's contract rates policy statement of November 1978 had made clear the relevance of such agreements to rate determinations by the Commission. See 45 Fed. Reg. 21720 (1980).

In February 1980, the Commission issued a further policy statement clarifying and modifying its position on contract rates. Ex Parte No. 358-F, 45 Fed. Reg. 21719 (1980). Because the Commission concluded that established legal principles concerning the effect of filed tariffs precluded the *courts* from giving meaningful effect to rail rate agreements, the Commission anounced that it would consider rate agreements in specific rate cases in deciding whether a tariff filing proposing to increase rates was lawful. In deciding what weight should be given to such agreements, the Commission's 1980 policy statement distinguished between agreements entered into before the November 1978 policy statement and those entered into afterwards. *Id.* at 21720. The Commission stated that an agreement entered into after the 1978 policy statement would create a presumption that a proposed rate in excess of the agreed rate is unreasonably high. But because the lawfulness of pre-1978 agreements was somewhat uncertain when the parties entered into them, the Commission stated that it would consider on a case-by-case basis whether, and to what extent, to rely on such agreements. *Ibid.*

The Commission announced that, in determining whether a proposed higher rate was reasonable, it would give great weight to a pre-1978 agreement if the evidence indicated (1) that the parties intended to be legally bound; (2) that the shipper reasonably relied on the agreement to its substantial detriment (*e.g.*, by making substantial investments); and (3) that public interest considerations warranted holding carriers to the agreement. The Commission would weigh the agreement together with all of the other factors bearing on the reasonableness of a proposed rate. 45 Fed. Reg. 21720 (1980).

2. In 1972, IP&L planned to construct a coal-fired generating plant at Council Bluffs, Iowa, and began a search for coal to fuel the plant (Pet. App. C5). In 1973, IP&L entered into an agreement with Amax Coal Company (Amax) for the purchase of coal from Amax's Belle Ayr, Wyoming, mine (Pet. App. C6). Under the agreement, execution of a formal contract was contingent on Amax's aid in negotiating a satisfactory freight rate (*ibid.*).

IP&L then began negotiations with BN—the only rail carrier serving the Belle Ayr mine—on a freight rate for coal movements from the mine to the Council Bluffs plant (Pet. App. C6). BN offered a rate of $3.21 per net ton in shipper-owned cars, subject to a cost escalation formula. IP&L accepted BN's offer in a July 1973 letter. IP&L thereafter formally concluded a contract with Amax for the purchase of coal and informed BN of the execution of the contract (*ibid.*).

From late 1973 until 1976, BN and IP&L met and discussed some of the terms of the tariff governing the Council Bluffs coal movement that BN would file with the Commission (Pet. App. C6). In 1975, IP&L agreed to BN's standard rate escalation formula (*ibid.*). During the discussions, the parties never questioned the agreed base rate of $3.21 per ton (*ibid.*). In January 1976, BN transmitted a letter of understanding memorializing the parties' agreement. IP&L signed it in February 1976 (*ibid.*).[1]

To implement the transportation of coal to its plant, IP&L purchased cars (at a cost of over $8 million), rebuilt the spur track at its plant to accommodate unit-trains (expending $1.3 million), and constructed the plant (Pet. App. C6-C7).

3. In 1977, IP&L notified BN that coal shipments to the plant would begin on January 1, 1978 (Pet. App. C7). BN requested Commission permission to publish a tariff at the rate as escalated under the agreed formula ($5.23) (*ibid.*). One month later, however, BN advised IP&L that it would not publish the agreed rate and would instead publish a higher rate ($7.38). In order to allow the coal movements to begin, BN published a tariff on a short term basis at the agreed, lower rate (*ibid.*).

After several months of coal shipments at the agreed rate, BN published a tariff proposing the higher rate ($7.38) (Pet. App. C7). The Commission instituted an investigation into the lawfulness of the rate and permitted BN to raise its rate slightly to the level then allowed under the agreed escalation clause ($5.62) (Pet. App. A5).

At the close of its investigation, the Commission issued a decision finding that (1) BN had market dominance over the coal shipments;[2] (2) BN had not shown that the proposed rate was reasonable; and (3) the maximum reasonable rate for the future was $7.25 (Pet. App. D33). The Commission did not consider the rate agreement because the negotiations occurred prior to the November 1978 Commission policy statement encouraging rate agreements and clarifying their lawfulness (Pet. App. D12).

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[1] The letter of understanding included a provision that the parties intended the agreed escalation formula to compensate BN for any increase above the base level cost of transporting the coal (Pet. App. C6). The letter stated that if either party suffered a "gross inequity" that resulted in the failure of the agreed escalation formula fairly to cover cost increases, then the inequity would be resolved by mutual agreement and, pending the agreement, neither party would be relieved of its obligation to transport coal or to pay for transportation under the current tariff and escalation clause (*ibid.*).

Both IP&L and BN sought judicial review of the Commission's decision. The appeals were consolidated in the United States Court of Appeals for the Eighth Circuit.[3] In January 1980, the Commission sought remand of its decision to reexamine its findings in light of its pending clarification and amplification of its policy on negotiated ratemaking (Pet. App. A5-A6). The court of appeals granted the request on May 7, 1980.

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[2] The Interstate Commerce Act provides that the Commission has no jurisdiction to find that a proposed rate exceeds a reasonable maximum unless it also finds that the rail carrier has "market dominance," which means "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. (Supp. III) 10709(a).

[3] In July 1979, IP&L obtained an order from an Iowa state court enjoining BN from collecting a rate different from that called for by the parties' agreement (Pet. App. E1). BN removed the case to the United States District Court for the Southern District of Iowa (*id.* at E2). The parties consented to considering the state court order a temporary restraining order in the federal court (*ibid.*). The federal court denied a preliminary injunction, but stayed the effect of its denial so as to permit IP&L to appeal to the court of appeals (*id.* at E7). The court of appeals entered a temporary injunction, ordering IP&L to pay into the custody of the federal district court all moneys representing the difference between the rate sought by BN and the contract rate (see *id.* at F7). The court of appeals ultimately reversed the lower court's denial of a preliminary injunction (*id.* at F8).

On its own motion, the court of appeals later consolidated IP&L's appeal of the denial of a preliminary injunction with the appeals of the Commission's decisions on the reasonableness of the rate proposed by BN (Pet. App. A27).

4. On remand, after examining the evidence of an alleged contract, the Commission concluded that BN and IP&L had entered into an agreement and that they had demonstrated by their conduct an intent to be bound by that agreement (Pet. App. C7-C8). The Commission held that IP&L relied on the agreement to its substantial detriment by entering into contracts to purchase coal and rail cars, making spur track improvements, and constructing a generating plant designed for Amax's low-sulphur coal (*id.* at C8). The Commission concluded that there was no compelling reason in the cost evidence not to apply the negotiated rate and determined that the maximum reasonable rate was $5.62—the agreed rate as escalated annually (*id.* at C9-C10).

The Commission vacated its prior decision "to the extent inconsistent" with the conclusions in its second decision and ordered BN to cancel the earlier approved $7.25 rate and to establish a new rate at the agreed level (Pet. App. C16-C17). The Commission did not order BN to refund any rates it had collected in the past because, under the court of appeals' order (see page 6, note 3, *supra*), IP&L had paid BN only the agreed rate, and had paid into an escrow account the difference between that rate and the $7.25 rate (Pet. App. C15).

The Commission reached its decision on September 29, 1980, and served it on the parties on October 1, 1980.

5. On October 14, 1980, The President signed into law the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, to be codified at 49 U.S.C. (Supp. IV) 10101a *et seq.* ("the Staggers Act"). Most

provisions of the Staggers Act, however, became effective *as of* October 1, 1980. See Section 710, 94 Stat. 1966, to be codified at 49 U.S.C. (Supp. IV) 10101 note.

The Staggers Act added a new section to the Interstate Commerce Act ("the Act") specifically authorizing railroads and shippers to enter into rate agreements, Section 208, 94 Stat. 1908, to be codified at 49 U.S.C. (Supp. IV) 10713. The Act had theretofore been silent as to rate agreements. Moreover, the new contract rate section contained a "grandfather" clause that specifically preserves the status of lawful rate contracts that were in effect on October 1, 1980 (Section 208, 94 Stat. 1909, to be codified at 49 U.S.C. (Supp. IV) 10713(j)):

> The provisions of this section shall not affect the status of any lawful contract between a rail carrier and one or more purchasers of rail service that is in effect on the effective date of the Staggers Rail Act of 1980. Any such contract shall hereafter have the same force and effect as if it had been entered into in accordance with the provisions of this section. * * *

The Staggers Act also modified the provisions governing findings of market dominance—a jurisdictional requisite to the Commission's finding a rail rate unreasonably high. See 49 U.S.C. (Supp. III) 10709; note 2, *supra*. The Act now provides that, in making its determination, the Commission shall not find market dominance if the rail carrier proves that the rate charged results in a revenue-variable cost percentage that is less than a specified level (160% from October 1, 1980 through September 30, 1981, and higher levels in succeeding years). Section 202, 94 Stat.

1900, to be codified at 49 U.S.C. (Supp. IV) 10709 (d)(2).[4]

6. BN sought judicial review of the second Commission decision.[5] The Court affirmed the Commission's decision, concluding that the BN-IP&L rate agreement was not illegal *per se* and that the Commission properly considered it as evidence bearing on the reasonable rate issue (Pet. App. A19-A21). The court found that both BN and IP&L intended to be bound by their agreement (*id.* at A21-A22). The court specifically approved the Commission's cost calculations as comporting with its established policy and with court precedent and found that the agreed rate meets the Act's revenue adequacy requirement (*id.* at A23-A25). It agreed that such reliance on rate agreements is likely to help railroads attain adequate revenues (*id.* at A25).

The court of appeals rejected BN's argument that the Staggers Act deprived the Commission of jurisdiction to set a maximum reasonable rate below the 160% revenue-to-variable-cost ratio specified in the act and that the court was accordingly required to vacate the Commission's decision (Pet. App. A6-A16). The court observed (*id.* at A10-A11) that because the Interstate Commerce Act, both before and after its amendment by the Staggers Act, required the Commission to make a market dominance finding within 90 days after the commencement of a proceeding (49 U.S.C. (Supp. III) 10709(b); Section 201, 94 Stat. 1899, to be codified at 49 U.S.C. (Supp. IV) 10701a(c)(3)), the new Staggers Act market dominance presumption must be intended to operate within that 90-day framework. Accordingly the court concluded (Pet. App. A11; emphasis in original) that the Staggers Act 160 % requirement for a market dominance finding, which also operated as a bar to the Commission's jurisdiction to find a rate unreasonable, applied only to "proceedings begun *on* or *after* [the] effective date of the Act, in which the ninety day period * * * has not begun to run" and "those few proceedings begun *before* the effective date of the Act in which the ninety day period for a jurisdictional determination still pends." As the court noted (Pet. App. A11), "[t]his is not such a case."

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[4] "Variable costs" vary directly with the amount of coal transported. Other, fixed costs do not vary directly and are analogous to overhead costs of a manufacturing enterprise.

[5] IP&L also sought review of the second decision. The court dismissed IP&L's petition on IP&L's request (Pet. App. A6 n.6).

The court of appeals found further support for its holding in the legislative history of the Staggers Act, which indicated that case law should control the courts' determination of the effect of the Act on pending cases (Pet. App. A11). Applying the principle that a court should not apply the law in effect at the time of its decision when this would result in manifest injustice, the court of appeals concluded (*id.* at A12-A16) that the Staggers Act provisions should not be applied on review in this case.

The court dismissed as moot IP&L's appeal of the denial of a preliminary injunction in the federal district court; but it did not dispose of the escrow account into which IP&L had paid the difference between the negotiated rate and the higher rate sought by BN (Pet. App. A27-A28) (see note 3, *supra*). In a subsequent unpublished decision, the court of appeals directed the district court to disburse the escrow fund to IP&L on receipt of its mandate (Pet. App. B). The court of appeals denied BN's petition to vacate the order disbursing the fund and for rehearing of the decision affirming the Commission (Pet. App. G). This Court denied BN's request for a stay of mandate pending disposition of its petition for a writ of certiorari (No. A-143, 1980 Term (Aug. 21, 1981)).

In October 1981, BN filed a tariff covering these coal movements that would raise its rates well above the current rate, as escalated under the agreement. The Commission rejected the tariff because the increase would violate its rate prescription in this case (App., *infra*).[6] The Commission stated that if BN wishes to increase its rates above the agreed level, it should petition to lift the prior rate prescription before filing a proposed increase (App., *infra*, 2a).

ARGUMENT

The court of appeals reached the proper result in this case, and its decision does not conflict with decisions of this Court or of any other court of appeals. In view of the timing of the Commission decision in this case, a resolution of the jurisdictional issue petitioners seek to present would affect very few cases and would have no continuing significance. This case, accordingly, does not warrant further review.

1. Petitioner contends (Pet. 12-19) that the court of appeals erred by affirming the Commission's decision in defiance of what petitioner characterizes as "jurisdictional provisions" (*id.* at 15) of the Staggers Act that retroactively deprived the Commission of authority to render its decision. Neither of the provisions on which petitioner relies, however, logically applies to a rate-making determination, like the one at issue here, that was made before the Staggers Act became effective. Thus, while the Commission believes that it retains jurisdiction under Section 208 of the Staggers Act over rate agreements entered into before

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[6] The Commission's decision rejecting that tariff is printed as an appendix to this brief. BN has filed a petition for mandamus in the United States Court of Appeals for the District of Columbia Circuit, asking that the Commission be directed to file the tariff. *Burlington Northern R.R.* v. *ICC*, No. 81-2290 (filed Dec. 8, 1981).

that Act became effective, the court of appeals found it unnecessary to reach that question here (Pet. App. A9-A10 & n.11) and decided the case on narrow grounds that would apply, at most, to three other cases.[7]

Even before passage of the Staggers Act, the Commission was permitted to find a carrier's established rate unreasonably high only if it concluded that the carrier exercised market dominance. 49 U.S.C. (Supp. III) 10709. The Staggers Act did not alter the Commission's jurisdiction to consider whether a carrier had market dominance and to prescribe a reasonable rate if it found such dominance. The Act simply provided that the Commission "shall find" that the carrier "does not have market dominance" unless, during the period October 1, 1980, through September 30, 1981, the revenue-variable cost percentage exceeds 160 %, or unless the percentage exceeds certain specified higher figures during succeeding years. Section 202, 94 Stat. 1900, to be codified at 49 U.S.C. (Supp. IV) 10709(d)(2).

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[7] We know of only three other cases within the class described by the Eighth Circuit as escaping the application of the Staggers Act, and it is impossible for any cases henceforth commenced to come within that class. I.C.C. Docket No. 37135, *Increased Rates on Coal, BN, Montana to Superior, Wisconsin*, 362 I.C.C. 625 (1980), aff'd in part and remanded in part in *Cleveland Cliffs Iron Co.* v. *ICC*, No. 79-3775, etc. (6th Cir. Nov. 20, 1981); I.C.C. Docket No. 36970, *Annual Volume Rates on Coal, Wyoming to Flint Creek, Arkansas*, decision served Feb. 4, 1981, appeal pending, No. 79-1547 (D.C. Cir., filed May 25, 1979); I.C.C. Docket No. 37507, *Rates on Iron Ore, Randville to Escanaba via Iron Mountain*, decision served July 17, 1981, appeal pending, No. 81-3413 (6th Cir., filed July 17, 1981). If one considers only the class of cases in which the Commission made its decision before the effective date of the Staggers Act, the class consists of only one case in addition to the present case: *Increased Rates on Coal, BN, Montana to Superior, Wisconsin*, *supra*.

On September 29, 1980, when the Commission reaffirmed its market dominance decision in this case and made its final rate determination, it applied the only law then in existence; it properly refrained from attempting to redetermine market dominance according to criteria of a law not yet enacted (Pet. App. C1-C26). Similarly, because the Staggers Act was not yet in effect, the Commission's consideration of the parties' rate agreement in making its reasonableness determination could hardly detract, as petitioner suggests (Pet. 14), from the jurisdiction of courts under Section 208 of the Staggers Act. That section added a new statutory provision, to be codified at 49 U.S.C. (Supp. IV) 10713(i)(2), providing in pertinent part that rail carriers are entitled to enter into contracts with shippers and to file those contracts with the Commission, and that the "exclusive remedy for any alleged breach of a contract entered into under [Section 10713]" is an action in an appropriate state or federal court.

Nothing in the Staggers Act indicates that Congress intended to unsettle prior administratively final decisions. Rather, as the court of appeals noted (Pet. App. A11), the legislative history indicates that Congress contemplated that the statute's effect on pending cases, including cases pending on judicial review, should be determined by the case law on retroactivity. The court of appeals properly applied settled legal principles in determining that the retroactive application of the Staggers Act sought by petitioner was unwarranted because it would result in manifest injustice. *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974), and *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268 (1969). Because in this case, unlike *Bradley* and *Thorpe*, retroactive application of the statute would unsettle a final administrative decision made before the statute was enacted, as well as produce the unjust results described by the court of appeals, retroactive application clearly was unwarranted.

There is no merit to petitioner's contention (Pet. 14-18), based on *Bruner* v. *United States*, 343 U.S. 112 (1952), that the principles applied by the court of appeals are inapplicable because a jurisdictional statute is at issue. As this Court explained in *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386, 390 (1953), that rule applies only in the case of the "repeal of statutes solely jurisdictional in their scope" and not to "statutes which create rights and also prescribe how the rights are to be vindicated." Before passage of the Staggers Act, shippers enjoyed a right (independent of any contract claim) to be relieved of rates deemed unreasonable by the Commission, even if those rates were below the percentage figures for revenue-variable cost later specified in the Staggers Act as conclusive on the market dominance question. After passage of the Act, shippers did not enjoy such a right in any forum. The fact that the change in substantive law controlling the market dominance determination can be viewed as affecting the Commission's "jurisdiction" does not make this a provision "solely jurisdictional in * * * scope."[8]

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[8] It should be noted that petitioner's theory would also require a court to vacate any Commission decision made during the period from October 1, 1980, to September 30, 1981, finding unreasonable a rate that *exceeded* the 160 % figure applicable to market dominance findings made during that period if (1) the rate did not exceed the 165 % figure applicable during the period beginning October 1, 1981, and ending September 30, 1982, and (2) the decision were pending on judicial review on or after October 1, 1981. Congress cannot

Finally, it should be noted that the only other court of appeals to consider the question whether, in a case such as this, enactment of the Staggers Act retroactively invalidated a Commission decision has expressly noted its agreement with the court below. *Cleveland Cliffs Iron Co.* v. *ICC*, Nos. 79-3775, 79-3777, 80-3020, 80-3159 & 80-3161 (6th Cir. Nov. 20, 1981), slip op. 40-41. Thus, whatever may be the desirability, in some future case, of considering the broader question of continuing Commission jurisdiction over pre-Staggers Act rate agreements—the question that the court below expressly declined to decide in this case—there is clearly no reason for this Court to review the narrow issue actually resolved here.

2. Petitioner also contends (Pet. 19-24) that rate agreements between shippers and carriers were unlawful prior to the Staggers Act and that the court of appeals therefore erred in affirming a Commission decision that relies on the rate agreement with IP&L. This contention is without merit.

Again, we note that the only other court of appeals to address this precise issue agrees with the Eighth Circuit. *Cleveland Cliffs Iron Co.* v. *ICC*, *supra*, slip op. 7-10. The decisions on which petitioner relies are inapposite.

Petitioner's argument is based on the assumption that the Commission "enforced" the rate agreement. Instead, as the court of appeals properly found (Pet. App. A20-A21, A22-A24), the Commission simply gave weight to the agreement as relevant evi-

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reasonably have intended that the specified percentage figures for succeeding years could be made effectively inapplicable whenever (as is likely to be the case) the process of judicial review cannot be completed within a year of the date on which the new revenue-variable cost figure became applicable to market dominance findings.

dence bearing on the question of what rate was reasonable—evidence that it considered along with other relevant factors in determining the maximum reasonable rate.

Contrary to petitioner's contention (Pet. 20-24), *United Gas Pipeline Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956), and *American Broadcasting Companies, Inc.* v. *FCC*, 643 F.2d 818 (D.C. Cir. 1980), do not establish that the rate agreement in question here was unlawful and thus precluded the Commission from even considering it as a factor in the reasonableness determination.

In *United Gas*, this Court explained (350 U.S. at 338) that a private agreement could not authorize rail shippers to pay a rate different from the rate filed with the Interstate Commerce Commission. In the present case, however, the shippers did *not* pay a rate different from that approved by the Commission. Rather, the Commission simply considered the parties' agreement when it decided whether the rate petitioner had filed was in fact reasonable.[9]

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[9] There is similarly no merit to petitioner's contention (Pet. 21 n.18) that this Court's citation of *United Gas* in its opinion in *Arkansas Louisiana Gas Co.* v. *Hall*, No. 78-1789 (July 2, 1981), slip op. 11, "demonstrates that the Court of Appeals was incorrect in disregarding this Court's holding in *United Gas.*" In *Arkansas Louisiana* this Court observed (slip op. 11; footnote omitted): "[T]o permit parties to vary by private agreement the rates filed with the Commission would undercut the clear purpose of the congressional scheme [in the Natural Gas Act]: granting the [Federal Energy Regulatory Commission] an opportunity in every case to judge the reasonableness of the rate. Cf. *United Gas Pipeline Co.* v. *Mobile Gas Corp., supra*, at 338-339." Here, by contrast, the Interstate Commerce Commission has had the opportunity to judge the reasonableness of petitioner's rate and simply considered the rate agreement in making its judgment. In any event, the holding of *United Gas*—that the Natural Gas Act

Petitioner also errs in its contention (Pet. 23) that the court of appeals reached a conclusion opposite from that reached by the District of Columbia Circuit in *American Broadcasting Companies, Inc.* v. *FCC*, *supra*, regarding "the power of [an] agency to enforce rate contracts." As the court below correctly pointed out (Pet. App. A17):

> The determinative feature [of *ABC* and the line of precedent on which it relies] is a conflict between the duly filed rate approved by the regulatory agency, and a different rate arising from a private agreement, rate representation, or equitable consideration. In such circumstances, the established tariff rate, approved by the ICC, must prevail.

Here, the Commission's ratemaking authority was not threatened because there was no attempt to alter an approved rate simply by reference to a private agreement. Rather, as the court of appeals found (Pet. App. A17-A18), "the parties' contract rate and the rate approved as a reasonable maximum by the ICC through normal statutory procedures are the same." [10]

"does not empower natural gas companies unilaterally to change their contracts" where the contract rates had been approved as reasonable (350 U.S. at 344)—can hardly be said to be a controlling principle that the court of appeals "disregarded" in this case.

[10] Petitioner also alleges (Pet. 24-25 n.21) that the Commission acted arbitrarily and capriciously in applying its February 1980 negotiated ratemaking policy to the rate agreement with IP&L, since prior to that time the Commission had declined to consider such agreements (see pages 2-3, *supra*). Petitioner concedes (Pet. 25 n.21), however, that a regulatory agency may apply a policy retroactively when it determines that the benefits of retroactive application out-

3. The court of appeals ordered the United States District Court for the Southern District of Iowa to disburse to IP&L an $11 million escrow fund consisting of the amounts paid by IP&L in excess of the maximum reasonable rate established by the Commission. Petitioner contends (Pet. 25) that the disbursement order conflicts with *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932). There is, however, no reason to disturb the court of appeals' order. The circumstances here are not those of *Arizona Grocery.* Moreover, we are aware of no other pending case in which such an escrow fund has been created, so the question is not of sufficient importance to merit review by this Court.

In *Arizona Grocery*, the Court held that the Commission lacked authority under the Interstate Commerce Act to set a maximum reasonable rate in one proceeding and, in a later separate proceeding, to set a new, lower rate and to order the carrier to refund the difference between the two rates which the carrier had collected during the interim. Such a reparations order, the Court concluded, constituted an improper retroactive repeal of the original rate decision. 284 U.S. at 388-389. The present case does not involve

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weigh the burdens. And, contrary to petitioner's claim that the Commission failed to consider such factors, the Commission specifically addressed this point (Pet. App. C12), concluding that the only burden on petitioner is its inability to charge a rate higher than the one to which it had freely agreed. In the Commission's opinion, that burden would not justify a refusal in this case to apply its negotiated ratemaking policy, which is generally beneficial to shippers and carriers alike. The court of appeals agreed (Pet. App. A27) that the Commission's analysis was sound.

two separate Commission proceedings, but rather a redetermination of a rate following a judicial remand. Moreover, the Commission issued no refund order, since, as it observed (Pet. App. C15), owing to the escrow fund, petitioner had received no payments in excess of the agreement rate.[11] Thus, the court of appeals has simply ordered payment to IP&L of an escrow fund consisting of the amount it paid under protest in the belief, now confirmed by the final Commission decision, that the $7.25 figure in the Commission's earlier, now vacated determination was unreasonable. This was a proper use of the court of appeals' equity powers, and it did not retroactively repeal a Commission decision or otherwise infringe on the Commission's jurisdiction.[12]

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[11] The question whether the Commission itself may order refunds in a similar context is pending in *Burlington Northern Inc.* v. *United States*, No. 79-1547 (D.C. Cir., petition for review filed May 25, 1979).

[12] Thus, contrary to petitioner's suggestion (Pet. 29), the order here does not violate the principles underlying the Court's conclusion in *Arkansas Louisiana Gas Co.* v. *Hall*, *supra*, slip op. 7, that a state court should not be permitted to award retroactive rate increases to natural gas producers in contract damage actions, based on the court's view of what the appropriate federal agency would consider a reasonable rate. Such awards, the Court observed (*ibid.*), "would undermine the congressional scheme of uniform rate regulation" where the damages represented "a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act." Obviously the escrow order here works no such interference with the federal scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

ROBERT S. BURK
Acting General Counsel

KATHLEEN M. DOLLAR
Associate General Counsel

CECELIA E. HIGGINS
Attorney
Interstate Commerce Commission

DECEMBER 1981

APPENDIX

INTERSTATE COMMERCE COMMISSION DECISION

No. 38723

IOWA POWER AND LIGHT COMPANY —PETITION FOR REJECTION— SUPPLEMENT NO. 4 TO TARIFF ICC BN 4187-B

DECIDED: October 30, 1981

Iowa Power and Light Company has filed a petition requesting rejection of Supplement No. 4 to Tariff ICC BN 4187-B issued by Burlington Northern Inc. on the basis that it proposes to increase a prescribed rate without authorization of the Commission.

Tariff ICC BN 4187-B names unit train rates on coal from Belle Ayr and Eagle Junction, WY to Council Bluffs, IA. The rate in this tariff (presently 762 cents per net ton) was prescribed by the Commission under I&S No. 9199.

Supplement No. 4 to the tariff, scheduled to become effective November 1, 1981, proposes to increase the rate to 1095 cents per net ton.

Iowa Power and Light Company alleges that the Commission's tariff publishing regulations provide for the rejection of any tariff filing which violates any order of the Commission, including an outstanding rate prescription.

Burlington Northern Inc. states that the Staggers Rail Act eliminated Commission jurisdiction over rail rates less than 165 percent of variable costs.

The petition will be granted.

The tariff increase, if allowed to become effective, would violate the Commission's rate prescription in *Unit Train Rates on Coal—Burlington Northern Inc.*, 346 ICC 186, 200 (1980).

In that case, the Commission prescribed a maximum reasonable rate at the level agreed upon by the parties, in accordance with the Commission's contract rates policy. The Commission's decision was affirmed on appeal, *Iowa Power & Light Co.* v. *Burlington Northern Inc.*, 647 F.2d 797 (8th Cir. 1981).

Section 208 of the Staggers Act contains a grandfather subsection, providing that lawful contracts entered into prior to the Staggers Act shall have the same force and effect as if entered into in accordance with Section 208.

In Ex Parte No. 358, *Change of Policy—Railroad Contract Rates* (decision of February 21, 1980) and the *Interpretive Statement—Contract Rates*, November 10, 1980 (unprinted decision), we explained our rationale for retaining jurisdiction over pre-Act rate agreements in accordance with our contract rate policy.

Moreover, in No. 38634, *Petition for Declaratory Order—Pre-Staggers Act Rate Agreements*, served July 28, 1981, we asserted our continued jurisdiction to prescribe maximum reasonable rates, based on pre-Act agreements, below 160 percent of variable costs.

The carrier should petition the Commission to lift the rate prescription prior to filing a proposed increase.

This action does not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

The petition is granted and the publication is rejected.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam. Chairman Taylor was absent and did not participate.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

☆ U. S. GOVERNMENT PRINTING OFFICE; 1981 358601 738

Petitioner's Reply Brief

Office-Supreme Court, U.S.
FILED
DEC 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-755

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

Burlington Northern Inc.,
Petitioner,
v.
The United States of America, The Interstate Commerce Commission and Iowa Power and Light Company,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER BURLINGTON NORTHERN INC.

CURTIS H. BERG
ALAN R. POST
176 E. Fifth St.
St. Paul, Minnesota 55101

Of Counsel

R. EDEN MARTIN
RICHARD E. YOUNG
1730 Pennsylvania Ave., N.W.
Washington D.C. 20006
(202) 624-1412

HOWARD J. TRIENENS
THEODORE N. MILLER
RICHARD J. METZGER
One First National Plaza
Chicago, Illinois 60603

Attorneys for Petitioner

December 29, 1981

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No. 81-755

IN THE
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OCTOBER TERM, 1981

Burlington Northern Inc.,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER BURLINGTON NORTHERN INC.

Railroad Petitioner Burlington Northern Inc. ("BN") hereby replies to the joint brief of Federal Respondents the United States of America and the Interstate Commerce Commission, and to the brief of Respondent Iowa Power and Light Company ("IP&L"), which were filed December 18, 1981, in opposition to BN's petition that a writ of certiorari be issued to review a judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

THE BRIEFS IN OPPOSITION CONFIRM THAT THE PETITION FOR CERTIORARI SHOULD BE GRANTED

While the briefs in opposition of Federal Respondents and IP&L assert that the decision below does not conflict with this

Court's precedents, no Respondent effectively disputes the specific conflicts identified in BN's petition for certiorari. Rather than join issue as to any of the three particular errors raised by BN, Respondents are content either to avoid the plain thrust of BN's arguments, to respond to only a portion of BN's arguments, or else to urge distinctions that have already been addressed in BN's petition and rejected by the authorities cited there. This half-hearted defense essentially concedes that the decision below does conflict with this Court's decisions.

As to the need for review by this Court of the errors in the decision below, Respondents' submissions are similarly misdirected. Although the holding of the Court of Appeals plainly embraces any situation where Congress alters the jurisdiction of a lower tribunal, Respondents attempt to limit the effect of the decision below to only those ICC rate cases that were pending appeal when Congress altered the jurisdiction of the Interstate Commerce Commission on October 1, 1980. While the judicial resources and substantial revenues involved in those cases would plainly justify review in and of themselves, the holding of the decision below extends far beyond those cases, given the substantial and continuing Congressional changes in Federal regulation. Similarly, the other errors identified by BN reach many more cases than those identified by Respondents.

I. Respondents Virtually Concede that the Decision Below Conflicts with this Court's *Bruner-Smallwood* Rule.

The Commission's first *IP&L* decision was served July 16, 1979, and was immediately appealed to the Eighth Circuit. After obtaining a remand of the judicial review proceedings, the Commission served its second *IP&L* decision on October 1, 1980—the same date that the Staggers Rail Act of 1980 became effective pursuant to its Section 710(a). The Court of Appeals on April 27, 1981, issued its decision below affirming the Commission more than six months after the effective date of the Staggers Act (BN Petition at 6-10).[1]

BN's petition for certiorari showed that this Court's decisions in *Bruner* v. *United States*, 343 U.S. 112 (1952), *Smallwood* v. *Gallardo*, 275 U.S. 56 (1927), and *Hallowell* v. *Commons*, 239 U.S. 506 (1916), have established and applied the rule that Congressional removal of jurisdiction from a lower tribunal requires a reviewing court to vacate any decision by the lower tribunal that is premised upon any jurisdictional provisions thus withdrawn. The Court of Appeals violated this rule in its decision below.[2]

Federal Respondents do not effectively dispute BN's claim that the Staggers Act withdrew the Commission's jurisdiction to enter the order that was affirmed in the decision below. While the *Commission* asserts that Section 208 of the Act does not remove its jurisdiction "over rate agreements entered into before [the Staggers] Act became effective" (US-ICC Brief at 11-12), the *United States* makes no such claim. In addition, each of the three Federal courts that have decided this issue agree that Section 208 *does* remove the Commission's asserted jurisdiction over rate agreements (including the Sixth Circuit in its recent decision in

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[1] After the Court of Appeals declined to apply the Staggers Rail Act of 1980 in reviewing the Commission's treatment of BN's rate proposal, BN returned to the Commission in October of 1981—more than one year after the effective date of the Act—and sought to increase the IP&L rate in reliance upon the Staggers Act. The Commission refused to permit BN to file the higher rate permitted by the Act for the express reason that the higher rate would violate the Commission's second *IP&L* decision (Federal Respondents' App. 2a). BN has appealed the Commission's rejection in *Burlington Northern R.R.* v. *ICC*, D.C. Cir. No. 81-2290 (filed December 8, 1981).

[2] BN argued that the Staggers Act removed the Commission's jurisdiction for two separate and independent reasons: (1) Section 202 of the Act added a requirement to the market dominance provisions of the Interstate Commerce Act prohibiting the Commission from prescribing rates less than 160 percent of variable cost (the rate prescribed by the Commission in the order under review being only 123 of variable cost as determined by the Commission); and (2) Section 208 of the Act conferred exclusive jurisdiction to enforce rate agreements upon the courts, rather than the Commission.

Cleveland Cliffs Iron Co. v. *ICC*, Docket No. 79-3775, decision served November 20, 1981, at 45).

Federal Respondents maintain, however, that the Court of Appeals was correct in applying the holding of this Court's decisions in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974), and *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268 (1969), which deal with the retroactivity of changes in substantive law—rather than the *Bruner-Smallwood* rule, which governs changes in jurisdiction—because "that rule [*Bruner-Smallwood*] applies only in the case of the 'repeal of statutes solely jurisdictional in their scope' and not to 'statutes which create rights and also prescribe how those rights are to be vindicated' " (US-ICC Brief at 14, quoting *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386, 390 (1953)). Because Section 202 removes the right of shippers to seek a rate below 160 percent of variable cost, Federal Respondents contend it is not "solely jurisdictional," and therefore not controlled by *Bruner-Smallwood*.

First, Federal Respondents' narrow reading of *De La Rama* is unsupported by that decision. While this Court's opinion does refer to the distinction between statutes "solely jurisdictional in their scope" and statutes "which create rights" in the passage quoted by Federal Respondents, *De La Rama* did *not* hold that the *Bruner-Smallwood* rule applies solely to the first category. Indeed, this Court stated in the same paragraph relied upon by Federal Respondents that "[i]f the aim [of Congress] is to destroy a tribunal *or to take away cases from it, there is no basis for finding savings exceptions unless they are made explicit*" (344 U.S. at 390; emphasis supplied). Second, even if Federal Respondents were correct as to *De La Rama*, Congress made it plain that the rate-to-variable-cost threshold of Section 202 *is jurisdictional* (H.Rep. 96-1430, 96th Cong., 2d Sess. 80 (1980)):

> "Specifically, Title II provides the Interstate Commerce Commission with *jurisdiction* to determine rate reasonableness only when a rail carrier has market dominance and the rate exceeds the applicable revenue-variable cost percentage threshold. The revenue-variable cost percentage is a level below which the Commission has no *jurisdiction* over the reasonableness of maximum rates." (Emphasis supplied.)

Even more significantly, Federal Respondents decline to apply their definition of a statute "solely jurisdictional in scope" to Section 208 of the Staggers Act, in which Congress—in contrast to Section 202's asserted extinguishment of certain shipper rights—simply transferred exclusive jurisdiction over rate agreements from the Commission to the courts. Thus, even if Federal Respondents' limitation of *Bruner-Smallwood* were correct (and it is not), and would remove Section 202 from that rule (which it would not), Federal Respondents have to concede (and have conceded by their silence) that Section 208's transfer of exclusive jurisdiction over rate agreements from the Commission to the courts without altering any underlying cause of action based on such agreements is squarely controlled by *Bruner-Smallwood*, and that the Court of Appeals necessarily erred in failing to apply Section 208 in reviewing the Commission's decision.[3]

As to the need for review of the jurisdictional holding of the Court of Appeals, both IP&L and Federal Respondents are silent, though they do address the need for review of other portions of the decision. This silence in effect acknowledges that review of the jurisdictional holding is necessary in light of the uncertainty that would result if reviewing courts could apply the discretionary "manifest injustice" exception of *Bradley*, rather than the *Bruner-Smallwood* rule, to pending Federal decisions where Congress had altered a Federal tribunal's jurisdiction to enter an order under review.

II. Respondents Do Not Challenge BN's Showing that the Decision Below Conflicts With Other Federal Decisions Holding that the Commission Cannot Enforce Rate Agreements.

Federal Respondents concede that this Court's decision in

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[3] IP&L offers a different response to this part of BN's petition. IP&L asserts that BN is attempting to "read the 'manifest injustice' exception out of *Bradley*" (IP&L Brief at 12). This is incorrect. BN maintains that *Bradley* does not apply to the change in jurisdictional statute involved in this case, and that the *Bruner-Smallwood* rule applies instead. IP&L has chosen not to refer to any of this Court's decisions that explain and apply the *Bruner-Smallwood* rule, and, *a fortiori*, makes no claim that this rule should not control the decision below.

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), squarely holds that (US-ICC Brief at 16):

> ". . . a private agreement could not authorize rail shippers to pay a rate different from the rate filed with the Interstate Commerce Commission."

They then argue that "[i]n the present case, however, the shipper did *not* pay a rate different from that approved by the Commission" (*id.* at 16; emphasis in original). This argument is factually incorrect.

The Commission's first *IP&L* decision approved a rate that was higher than the rate agreement level, and that higher rate was duly filed by BN in a tariff. Subsequently, in its second *IP&L* decision the Commission ordered that the tariff rate be reduced to the rate agreement level. The Commission's order approving the first rate level has not been set aside, but BN has not been permitted to collect its tariff rate for the period it was in effect because of its asserted rate agreement with IP&L. Thus, the decision below conflicts with Federal Respondents' own understanding of *United Gas*.

Both Federal Respondents and IP&L also fail to deal with the District of Columbia Circuit's decision in *ABC* v. *FCC*, 643 F.2d 818 (D.C.Cir. 1980). In that case the existence of any power in the Commission to enforce a rate agreement was squarely rejected in a decision based on this Court's own precedents.[4] BN demonstrated that the court below had misread *ABC* by limiting it solely to "a conflict between the duly filed rate approved by the regulatory agency, and a different rate arising from a private agreement . . ." (Pet. App. A17). This limitation is improper because *ABC* was an appeal from an agency proceeding in which the agency itself *had declined* to enforce a rate agreement because it believed it had *no power* to do so. Consequently, there was not even the possibility in *ABC* of an inconsistency between the rate determination of the agency and of a lower court that had been asked to enforce a rate agreement. Instead, the issue posed in *ABC* was precisely the issue presented to the court below—whether the agency itself could enforce the rate agreement. The agency held it could not, and the court of appeals affirmed.

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[4] Each Respondent claims that the Commission did not enforce the letter of understanding, but rather considered it along with other "relevant factors" (US-ICC Brief at 15-16; IP&L Brief at 12-13). This assertion is not realistic because the first Commission *IP&L* decision (which expressly declined to enforce the asserted agreement) approved a maximum rate substantially higher than the agreement level, while the second Commission decision (which *did* consider the asserted rate agreement and relied upon exactly the same evidence of record as did the first decision) fixed a maximum rate equal to the rate agreement level *to the penny*.

Neither Federal Respondents nor IP&L have responded to this analysis of *ABC*. Instead, each implicitly concedes BN's point by relying solely upon the Court of Appeal's misreading of *ABC* (see US-ICC Brief at 17; see IP&L Brief at 13).[5]

IP&L and Federal Respondents attempt to minimize the importance of granting review as to this issue by suggesting that the issue of the legality of pre-Staggers Act rate agreements affects only the cases currently in litigation. In fact, while there is no way to predict precisely how many more proceedings will now be initiated to enforce pre-Staggers Act rate agreements, the decision below will clearly encourage such suits if the holding is permitted to stand. The time and resources that would be devoted to these cases could be avoided if this Court corrects the decision below by granting review on this issue now.

III. Respondents Do Not Effectively Dispute that the Disbursal of the Escrow Fund to IP&L Violated this Court's Decision in *Arizona Grocery*.

BN showed in its petition for certiorari that the decision below violated this Court's decision in *Arizona Grocery Co.* v. *Atchison,*

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[5] IP&L cites *H.P. Hood & Sons* v. *Delaware & Hudson Co.*, 17 I.C.C. 15, 18-19 (1909), for the proposition that the Commission has long been able to consider rate agreements in determining maximum reasonable rates (IP&L Brief at 13). *H. P. Hood* and the other cases cited at that part of IP&L's Brief hold only that a railroad-shipper agreement upon a rate level is evidence that the rate falls *within* the zone of reasonableness. They do *not* stand for the very different proposition that an agreed-upon rate thereby marks the upper limit of the zone of reasonableness.

T. & S. F. Ry. Co., 284 U.S. 370 (1932), by distributing an escrow fund to IP&L even though the monies in that fund had been paid pursuant to a tariff approved in a Commission order that has never been judicially stayed or set aside.[6]

Federal Respondents maintain that "[t]he circumstances here are not those of *Arizona Grocery*" (US-ICC Brief at 18), but the only circumstance which they find different is that the Commission's rate re-determination in the present case took place in the *same* agency docket, while in *Arizona Grocery* the Commission's rate re-determination occurred in a *different* agency docket. As BN pointed out in its petition (at 27), this asserted distinction makes no sense, and was rejected by this Court in *Arizona Grocery* (284 U.S. at 390):

> "Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and *upon the same or additional evidence as to the fact situation existing when its previous order was promulgated*, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate." (Emphasis supplied.)

This Court's reference to "the same . . . evidence" plainly encompasses agency action taken in the same agency docket. See also

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[6] IP&L asserts that BN conceded below that IP&L could collect the escrow fund (IP&L Brief at 14). However, the necessary premise of BN's statement was that IP&L would prevail in its own pending judicial petition to set aside the Commission's first decision that had approved the tariff under which IP&L paid money into the escrow fund. IP&L subsequently withdrew its petition, thereby rendering the first *IP&L* decision final, and bringing *Arizona Grocery* protection into effect for the rate approved in that decision.

Similarly, IP&L's citation of this Court's decision in *Inland Steel Company* v. *United States*, 306 U.S. 153, 158 (1939), is inapposite because the Commission's order there had been judicially stayed, while in the present case *neither* the Commission's first order approving a rate higher than the asserted rate agreement level, or its second decision ordering that the tariff be reduced to the rate agreement level, was either stayed or set aside.

Industrial Sand Cases, 1930, 204 I.C.C. 159, 180 (1934), where the Commission itself applied *Arizona Grocery* to its rate re-determinations that were made in the same agency proceeding.[7]

Having implicitly acknowledged the error in this portion of the decision below, Federal Respondents assert that "we are aware of no other pending case in which such an escrow fund has been created, so the question is not of sufficient importance to merit review by this Court" (US-ICC Brief at 18). This misstates the issue raised by BN's petition. *Arizona Grocery* is founded upon the fundamental right and obligation of BN to collect the amounts shown in its tariffs where the Commission has approved those amounts in decisions that have not been judicially reversed. The plain effect of the decision below is to subvert the effect of the Commission's approval of BN's tariff for the period that tariff was in effect.

This tariff integrity principle—the right of a railroad to collect its tariff amounts regardless of any legal or equitable defenses so long as the Commission has approved that tariff in agency orders that have not been set aside or stayed—is also squarely presented in *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, No. 81-622, in which this Court granted review on November 17, 1981.[8] This Court's review of *Commercial Metals* underscores the continuing importance of the tariff integrity principle, and the need to protect it from the erosion presented in both *Commercial Metals* and the decision below. While BN maintains that the error in this portion of the decision below would merit summary reversal now, this Court should hold over the present petition until its decision in *Commercial Metals* is handed down if it wishes to insure that the decision below can be reversed summarily on this issue.

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[7] Federal Respondents suggest that the Commission's decision in its second *IP&L* decision not to grant reparations permitted the court below to avoid *Arizona Grocery* by disbursing the escrow fund to IP&L (US-ICC at 19). This is not correct, as BN pointed out in its petition for certiorari (at 26), because *Arizona Grocery* also held that a court may not retroactively amend a Commision order and award reparations when the Commission itself could not do so. When the Commission acts in its legislative capacity, its order is entitled to the same judicial deference as would be given to an Act of Congress. "Neither carrier nor shipper could thereafter draw into question *in the courts* the conduct of the other if it conformed to the legislative mandate, save by an attack on the constitutionality of the statute" (284 U.S. at 388). (Emphasis supplied.)

[8] In *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, 641 F.2d 235 (1981), the Fifth Circuit affirmed a district court judgment in favor of a consignor which refused to pay an approved railroad tariff rate because of the railroad's failure to comply with certain Commission credit regulations. *Commercial Metals* thus presents the same question as does this portion of BN's petition: whether a court can effectively alter tariff rates which the Commission itself has not altered, or cannot alter.

CONCLUSION

For the foregoing reasons, and those reasons set forth in the petition for certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

R. EDEN MARTIN
RICHARD E. YOUNG
1730 Pennsylvania Ave., N.W.
Washington D.C. 20006
(202) 624-1412

HOWARD J. TRIENENS
THEODORE N. MILLER
RICHARD J. METZGER
One First National Plaza
Chicago, Illinois 60603

Attorneys for Petitioner

CURTIS H. BERG
ALAN R. POST
176 E. Fifth St.
St. Paul, Minnesota 55101

Of Counsel

December 29, 1981